90-1201

Supreme Court, U.S.
FILED
JAN 28 1991
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

In The

Supreme Court of the United States

October Term, 1990

H. PAUL LILLEBO, et al.,

Petitioners,

v.

GRAY DAVIS, in his capacity as the Controller of the State of California, and CALIFORNIA STATE EMPLOYEES' ASSOCIATION,

Respondents.

Petition For Writ Of Certiorari To The Court Of Appeal Of California, Third Appellate District

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Do the First and Fourteenth Amendments to the United States Constitution permit a public employer to compel objecting nonmember public employees to contribute, as a condition of their employment, to the costs of an exclusive bargaining representative's lobbying activities which are outside the collective bargaining process and which have a direct impact on the political process of the state?

PARTIES TO THE PROCEEDING

The parties to the proceedings below and in this Court are:

Petitioners: H. Paul Lillebo, Helen Begovich, Melody Bowden, Joan Brandli, Sally Brown, Pamela Broyles, Linda L. Case Rainey, Mary Ann Comaduran, Shirley Cortell, Laurel Dailey, Dennis B. Ward, Eugene M. Deleon, Sonja A. Delgado, Greta Dumaguindin, Sue A. Eagen, Katherine Felion, Mary Hart, Karol Hildebrand, Frances M. Jones, Jacquelyn F. Kelley, William K. Lee, Nancy G. Lum, Elvera Maldanado, Marilyn Marchetti, Shirley J. Martucci, Connie S. Mathews, Isaias R. Mallari, Madeleine L. Owyang, Peter Panos, Janice Peterson Buhler, Lucia G. Quesada, Kathleen A. Santos, Doris J. Valdry, Mary L. Vanacore, Harry T. Van Fossen, J. Weaver, Barbara Babich, Harry Baertschi, Debi S. Banks, Grace Barrell, Magda Beutel, Jeanne Bickford, Dannie Bregman, Geraldine C. Buehler, Kathy Casado, Lynn Champomier, James Q. Coe, David G. Cowan, Christine Cummings, Fredrick P. DeRose, Alan Giorgi, Gerald D. Gordon, James J. Hanocek, Harley Hansen, Jr., Debra Heninger, Thomas Hughes, Robert F. Hunt, Marilyn Kehlet, Susana Kong, Tito Kumar, David L. Kupper, Dion E. Webb, Janet I. Webb, Hellen Laux, Georgia L. Lipphardt, Hugh C. Lowe, Clement L. Mansion, Jr., Martha Miller, Anthony G. Munso, Kaylyn Nafus Warren, Robert L. Riffle, Steven R. Sanabria, Mary Shiro, Daniel Stedman, Paula B. Steinman, James D. Strutton, Hazel Wambolt, John M. Woodbury, Keith C. Work, Fred LaCaro, Del Rasmussen, Phil Zentner, Keith L. Spear, Corine H. Creel, Rhane Vennes, Sandra P. Ortega, Cathleen M. Flohr, Lynne Goutermont,

PARTIES TO THE PROCEEDING – Continued

Dennis A. Herbert, Kathy Moore, Bill Nakata, and Linda Raines.

Respondents: Gray Davis, in his official capacity as the Controller of the State of California,[1] and California State Employees' Association, a recognized employee organization, designated as an exclusive representative.

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[1] The Court of Appeal substituted the name of the current Controller, Gray Davis, as a defendant acting in his official capacity, in place of the former Controller, Kenneth Cory. *Lillebo v. Davis*, 222 Cal. App. 3d 1421, 1426 n.3 (1990). Appendix at A-8.

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Petition For Writ Of Certiorari To The Court Of Appeal Of California, Third Appellate District

PETITION FOR WRIT OF CERTIORARI

Petitioners, H. Paul Lillebo, *et al.*, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the California Court of Appeal for the Third Appellate District in this case.

OPINIONS BELOW

The opinion of the California Court of Appeal is reported at 222 Cal. App. 3d 1421 (1990), and is reproduced as Appendix (App.) A. Page references are to the version in the appendix. The decision of the trial court is

reproduced as Appendix B. Order denying review by the California Supreme Court is reproduced as Appendix C.

JURISDICTION

The opinion of the California Court of Appeal, review of which is sought in this petition, was entered on August 20, 1990, and was filed that same day. A petition for review was filed with the California Supreme Court, which denied review on October 30, 1990. App. C. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The federal constitutional provisions at issue in this matter are the First and Fourteenth Amendments to the United States Constitution. The state statutes involved are the provisions of the Ralph C. Dills Act, formerly the State Employer-Employee Relations Act (the Act), codified at Government Code § 3512, *et seq*. The full text of the relevant provisions of the Act and the above-mentioned constitutional provisions are set out in Appendix D.

STATEMENT OF THE CASE

The issue in this case is whether objecting public employees can be compelled *by law* to pay money to support a labor union's lobbying activities which are

outside the collective bargaining process without further offending the workers' First Amendment rights of freedoms of speech and association. These rights are important and fundamental—too important and fundamental to be defeated by the lower court's expansive construction of the scope of an exclusive bargaining representative's activities which individuals may be compelled to subsidize as a condition of public employment. Yet, this is precisely what has occurred in this case. The lower court's decision has established an erroneous precedent which places additional burdens on nonmembers' First Amendment rights not necessary to the collective bargaining scheme.

To understand the force of the California public sector's collective bargaining scheme, it is not necessary to go beyond the facts of this case. In 1977, the California Legislature enacted the Dills Act to give public employees collective bargaining rights. Gov't Code § 3512, *et seq.*[1] The sole aim was to promote labor peace and stability by providing public employees the ability to speak with a common voice. Under state law, public employees of a particular bargaining unit may select a labor union to serve as their exclusive bargaining representative on subjects regarding wages, hours, and other terms and conditions of employment. Section 3517.

Up until 1983, voluntary members provided the sole source of financing the labor union's activities. The state

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[1] Unless otherwise indicated, all sections refer to the California Government Code.

Legislature then amended the Act granting to an exclusive bargaining representative the state-created authority to collect a compelled fee from the earnings of those public employees who refuse to join the labor union. To ensure that each public employee turns over the compelled fee to the exclusive bargaining representative, the state authorizes the state controller to act on behalf of the labor union to withhold this compelled fee from the employee's paycheck without the employee's consent. Section 3515.7(b). Although the Act statutorily authorizes that the amount of the compelled fee may be the same as voluntary member dues (Section 3513(j)), the California Court of Appeal interpreted the statute to require a reduced fee stating that it may be calculated only in such an amount as to defray the costs incurred by an exclusive bargaining representative in representing employees in their relations with the state. App. at A-49.

By state law, these compelled fees may be regularly used to support lobbying activities, which are outside the collective bargaining process, and which directly impact political and ideological causes with which the complaining public employees disagree. Section 3515.8. Anticipating complaints from public employees who refuse to join the labor union, state law allows each public employee to demand a refund of any pro rata share of the compelled fee used for partisan political or ideological purposes "only incidentally related to the terms and conditions of employment." Section 3515.8. State law specifically exempts from the refund the costs of a labor union's lobbying activities which foster policy goals or advantages in employment conditions *not achieved through the collective bargaining process. Id.*

Relying on the authority of *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), H. Paul Lillebo and over 200 active public employees of the State of California filed a complaint for declaratory and injunctive relief on May 2, 1983, alleging violations of their freedom of speech and freedom of association rights.[2] These public employees complain that a state law requiring them to underwrite the lobbying activities of a labor union does not promote labor peace and stability through the collective bargaining process. These public employees objected to the exaction of compelled fees for any purposes other than for approval or funding of a collective bargaining contract or a memorandum of understanding reached between the governor and the recognized employee organization following negotiations. Section 3517.5.

Cross motions for summary judgment were filed. The trial court granted California State Employees' Association's motion on June 21, 1988. The California Court of Appeal for the Third Appellate District affirmed that judgment on March 23, 1990. The petitioners then asked for a rehearing which was denied on April 17, 1990. Thereafter, petitioners filed a petition for review which was granted by the California Supreme Court on June 29, 1990. That court transferred the matter back to the Court of Appeal with directions to vacate and reconsider the cause in light of *Keller v. State Bar of California*, 495 U.S. ___, 110 L. Ed. 2d 1 (1990).

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[2] A second amended complaint was filed on December 11, 1986, and is reproduced in App. E. This complaint reduced the number of plaintiffs to 99. The number of plaintiffs remaining in this lengthy lawsuit is 94.

The Court of Appeal "reissued" its decision on August 20, 1990, finding the state law constitutional. The court upheld the use of compelled fees to finance the cost of lobbying activities of an exclusive bargaining representative which are outside the collective bargaining process. After acknowledging this Court's decision in *Ellis v. Brotherhood of Railway, Airline and Steamship Clerks*, 466 U.S. 435 (1984), that dissenting employees can be compelled to support the collective bargaining process only when the exclusive representative bargains directly with the employer, the court found it necessary to rewrite the statute. The court expanded the statutory definition of state employer to include not only the governor or his or her designated representative (Section 3513(i)) but the state Legislature as well. App. at A-36-37. The court further stated that requiring objecting public employees to support lobbying activities which benefit all state employees, not just those in the represented unit or even those not represented by the exclusive representative, does not further offend objecting government workers' First Amendment rights. App. at A-37. Because an exclusive bargaining representative presumably intends everything that it does will advance some employment related interest, the practical effect is to leave no functional limit on the collection of compulsory fees from objecting public employees. This allows a labor union to use compelled fees of objecting public employees not only to finance those collective bargaining activities between the exclusive bargaining representative and the public employer but also to use compelled fees of objecting public employees to lobby the Legislature on employment

related matters not directly or closely related to the collective bargaining process.

Petitioners sought review in the California Supreme Court on September 27, 1990. That court denied review on October 30, 1990. App. C.

The federal issues on which review is sought in this Court were first raised in the original complaint as well as the second amended complaint. App. at E-15-16. The constitutional issues were subsequently raised at each stage of the proceedings. The decision of the court below, review of which is sought, directly concerns the federal issues raised in this petition—the First Amendment to the United States Constitution. App. at A-10.

REASONS FOR GRANTING THE WRIT

Supreme Court Rule 10.1(c) lists among the considerations governing review on certiorari the circumstances when a state court of last resort has decided an important question of federal law which has not been, but should be, settled by this Court. The importance of the issue presented in this petition is apparent from this Court's acceptance of *Lehnert v. Ferris Faculty Association*, No. 89-1217, for review. *Lehnert*, a case which has similar issues to those presented in this petition, has been submitted to this Court for a decision after oral argument on November 5, 1990. An important question of federal law which should be settled by this Court is present in this case.

I

THE DECISION BELOW DIRECTLY CONFLICTS WITH ESTABLISHED DOCTRINE OF THIS COURT

The issue of compelled fees in public sector employment was addressed in *Abood*. In that case, this Court considered a Michigan law providing for "agency shop" which permits a labor union representing public employees to negotiate for an agency shop clause in their contract with the public employer. Agency shop requires employees who do not belong to the exclusive bargaining representative labor union to pay that organization a service fee in an amount up to regular member dues as a condition of continued employment. *Id.* at 211. This Court noted that "[t]o compel employees financially to support their collective-bargaining representative has an impact upon their First Amendment interests." *Abood*, 431 U.S. at 222.

Abood held that the First Amendment prohibits a union from using objecting nonmembers' agency-shop fees "for the expression of political views, on behalf of political candidates, or toward the advancement of other ideological causes not germane to its duties as collective-bargaining representative." 431 U.S. at 235. Such an arrangement was constitutionally permissible only insofar as the service charges are applied to collective-bargaining, contract administration, and grievance-adjustment purposes. 431 U.S. at 225-26. *Abood* also held that dissenting nonmembers "may constitutionally prevent the Union's spending a part of their required service fees to contribute to political candidates and to express

political views unrelated to its duties as exclusive bargaining representative." *Id.* at 234. Because of the case's posture, *Abood* did not further define what activities of a labor union can constitutionally be financed from objector's compelled fees. It did suggest that the answer to those "constitutional questions" depends on the extent to which "activities fall outside the Union's *duties* as exclusive representative or involve constitutionally protected rights of association." *Id.* at 237 and n.33 (emphasis added).

This case presents those "difficult constitutional questions," *id.* at 237 n.34, which the Court has not yet more specifically addressed in a public-sector context. In *Lehnert*, which is presently submitted to this Court for decision, this Court is being asked to draw the line between those types of activities which are chargeable to objecting and nonobjecting nonmember public employees alike and those activities which are not chargeable to objecting nonmember public employees because the activity is outside the collective bargaining process. In *Lehnert*, the objecting nonmember employees were required to contribute to (1) bargaining and litigation activities provided to employees in other bargaining units; (2) *lobbying* and electoral activities related to public education issues; (3) public relations activities related to contract negotiations specifically and education issues generally; (4) union conventions and meetings; and (5) expenses incurred during negotiations involving the tactic of threatening an illegal strike. Unlike *Lehnert*, this case presents only the constitutional issue of whether a state law can compel objecting public employees to

contribute to the lobbying activities of an exclusive bargaining representative which are outside the collective bargaining process and which directly impact the political process.

Recent decisions of this Court establish that chargeable costs must be defined narrowly in the public sector context because, "first, . . . *any* withholding of financial support for a public-sector union is within the protection of the First Amendment; and second, . . . the State . . . bear[s] the burden of proving that any union dues or fees that it requires of nonunion employees are needed to serve paramount governmental interest." *Abood*, 431 U.S. at 255 (Powell, J., concurring in the judgment). *See Keller v. State Bar of California*, 110 L. Ed. 2d 1; *Ellis v. Brotherhood of Railway, Airline, and Steamship Clerks*, 466 U.S. 435; and *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986).

Ellis determined what financial obligations an exclusive representative may impose upon nonmembers under the First Amendment and § 2, Eleventh of the Railway Labor Act (RLA), 45 U.S.C. § 152, Eleventh. While based partly on statutory construction, *Ellis* has constitutional underpinnings. *See Roberts v. United States Jaycees*, 468 U.S. 609, 637-38 (1984) (O'Connor, J., concurring). In *Ellis*, the Court rejected the Ninth Circuit's reasoning that, if "activities ultimately benefited the union's collective-bargaining efforts, the union was free to finance them with dues collected from objecting employees." This Court rejected that amorphous standard and narrowly defined chargeable activities "to avoid the constitutional difficulty" raised by the argument that the union's use of dissenters' fees for certain disputed purposes violated the First Amendment. *Ellis*, 466 U.S. 444-48, 451-53.

This case differs from *Ellis* in two respects. First, the rights violated here are wholly constitutional, not statutory, because the California agency-shop statute, Section 3515.8, " 'sanctions the use of nonunion members' fees for purposes other than collective bargaining.' " *Abood*, 431 U.S. at 232. As the Court said in *Abood*, 431 U.S. at 240, "that difference surely could not justify any lesser relief in this case." Second, although this is a public, rather than private, sector case, the "differences between public- and private-sector collective bargaining simply do not translate into differences in First Amendment rights." *Id.* at 232. Thus, although "in the public sector the lines may be somewhat hazier" between activities "for which contributions may be compelled" and those "for which such compulsion is prohibited," *id.* at 236, compulsion still is prohibited by the First Amendment unless a disputed activity directly serves the governmental interest that the agency shop is thought to advance.

In *Ellis* this Court noted that the coerced collection of service fees, even for bargaining, is *"a significant impingement* on First Amendment rights." *Ellis*, 466 U.S. at 455 (emphasis added). In spite of this "significant impingement of First Amendment rights," this Court stated that any interference with the employees' associational rights was constitutionally justified by the government's compelling state interest in industrial peace and stability fostered by the collective bargaining process. *Abood*, 431 U.S. at 222-23. *See Railway Employes' Department v. Hanson*, 351 U.S. 225, 233 (1956); *International Association of Machinists v. Street*, 367 U.S. 740, 761 (1961); *Ellis*, 466 U.S. at 448; and *Hudson*, 475 U.S. at 301 n.8. Any extraneous activity by the employee organization "not

germane to its duties as collective-bargaining agent" could not be financed from fees paid by those who object to the organization's ideological viewpoint. *Ellis*, 466 U.S. at 447; *Abood*, 431 U.S. at 209; and *Communication Workers of America v. Beck*, 487 U.S. 735, 745 (1988).

Any prior doubt that expressive rights must be examined under strict scrutiny in defining chargeable costs under public sector agency shop arrangement was dispelled by *Hudson*. Although *Hudson* concerned the procedures for collection of the compelled fee, it did state,

> "although the government interest in labor peace is strong enough to support an 'agency shop' notwithstanding its limited infringement on nonunion employees' constitutional rights, the fact that those rights are protected by the First Amendment requires that the *procedure be carefully tailored* to minimize the infringement." 475 U.S. at 302-03 (emphasis added; footnote omitted).

Because the substantive legal standard to determine chargeable costs is even more important than determining the procedure for collection, there is even greater reason for this Court to grant review. As recognized in *Hudson*, only the government's compelling interest in industrial peace and stability justifies a limited intrusion upon objecting public employee's First Amendment rights. *Hudson*, 475 U.S. at 301. This interest may be advanced by expenditures of compelled fees for activities that are an "integral part of the bargaining process." *Abood*, 431 U.S. at 236; *see Hudson*, 475 U.S. at 301. Unfortunately, the lower court ignored the commands for First Amendment strict scrutiny analysis in interpreting California law by allowing compelled fees of objecting public

employees to be used to finance lobbying activities which are outside the collective bargaining process. Consequently, the court's decision has significantly expanded *Ellis* without justification and without serious attention to the protections of the First Amendment.

In two recent decisions, this Court relied on *Abood* to apply First Amendment strict scrutiny analysis to protect the rights of objecting members.

In *Keller v. State Bar of California*, this Court held that the State Bar's use of mandatory dues to support political activities violated the First Amendment rights of lawyers who disagreed with the Bar's position. In analyzing the scope of permissible activities which may be financed with compelled fees, this Court applied the analysis used in agency shop fee decisions. Relying on the holding in *Abood*, this Court in *Keller* noted "that a union could not expend a dissenting individual's dues for ideological activities not 'germane' *to the purpose for which compelled association was justified: collective bargaining.*" 110 L. Ed. 2d at 14 (emphasis added). This Court found the political and ideological activities of the State Bar, including its lobbying activities, were not germane to the purpose of the State Bar. *Id.*

First Amendment strict scrutiny analysis was recently applied in *Austin v. Michigan Chamber of Commerce*, ___ U.S. ___, 58 U.S.L.W. 4371 (March 27, 1990), in which this Court addressed the Michigan Campaign Finance Act's prohibition against independent expenditures from corporate treasury funds in support of or opposition to political candidates. This Court found the state law did not violate the First Amendment because

the provision is narrowly tailored to serve a compelling state interest.

This Court noted that through state-created advantages corporations are allowed to play a dominant role in the nation's economy as well as to obtain " 'an unfair advantage in the political marketplace.' " 58 U.S.L.W. at 4373 (quoting *Federal Election Commission v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 257 (1986)). This gives unfair political advantage to corporations and provides the compelling interest of the state to regulate even the potential for such influence.

In finding the ban on use of general corporate funds to be precisely tailored to eliminate that distortion, this Court noted that labor unions also have the capacity to accumulate wealth yet the same distortion is eliminated. This Court stated:

> "[L]abor unions differ from corporations in that union members who disagree with a union's political activities need not give up full membership in the organization to avoid supporting its political activities. Although a union and an employer may require that all bargaining unit employees become union members, a union may not compel those employees to support financially 'union activities beyond those germane to collective bargaining, contract administration, and grievance adjustment.' " 58 U.S.L.W. 4375 (quoting *Communications Workers of America v. Beck*, 487 U.S. at 745.)

This Court then went on to explain:

> "An employee who objects to a union's political activities thus can decline to contribute to those activities, while continuing to enjoy the benefits derived from the union's performance of its

> duties as the exclusive representative of the bargaining unit on labor-management issues. As a result, the funds available for a union's political activities more accurately reflects [*sic*] members' support for the organization's political views than does a corporation's general treasury." 58 U.S.L.W. at 4375.

Unfortunately, the California Court of Appeal did not recognize that the state has a compelling state interest in regulating the potential corrosive and distorting effect on the political process of labor union wealth that is accumulated with the help of the state-conferred agency shop arrangement and used to influence the political process. Instead, the lower court's decision advances that distortion by allowing labor unions to use compelled fees to help finance political lobbying in support of its policy goals that objecting public employees do not support.

The decision of the California Court of Appeal stands in direct conflict with these decisions and this Court should grant review to resolve that conflict.

II

THE LOWER COURT DECISION FAILS TO SURVIVE THE LEVEL OF SCRUTINY REQUIRED BY THE FIRST AMENDMENT

There is no compelling state interest to require objecting public employees, by law, to underwrite the costs of a labor union's lobbying and other political activities which, at best, are only tangentially and unsubstantially involved in the collective bargaining process.

Unfortunately, the California Court of Appeal decision unfairly requires objecting employees to fund lobbying which is outside the scope of collective bargaining. California state law grants to labor unions special advantages such as authorizing the state controller to collect agency shop fees and voluntary membership fees from public employees on behalf of the labor union. This enhances the labor union's ability to accumulate wealth and to play a dominant role in the collective bargaining process. The Court of Appeal decision now permits labor unions to obtain an unfair advantage in the state's political process by using objecting public employees' compelled fees to finance their lobbying activities which are outside the collective bargaining process. This distorts the political process because it is not an indication of popular support for the labor union's position. Instead, this type of lobbying becomes substantive in nature and has ideological overtones. Because that type of lobbying impacts employees in general, or even the public as a whole, objecting employees should not share in its costs. This Court has acknowledged Thomas Jefferson's view that " ' "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical." ' " *Abood*, 431 U.S. at 234 n.31; *Keller*, 110 L. Ed. 2d at 11. While voluntary dues and fees collected from nonobjecting public employees may be used to finance this political and ideological activity, it is an impermissible infringement on the constitutional rights of objecting nonmember public employees to use their compelled fee for such purposes.

The bottom line must rest on an identification of the state's compelling interest in requiring agency shop. That

interest cannot be merely to secure higher wages or better conditions for employees, for that type of interest can easily be advanced without infringing on nonmember's First Amendment liberties—the state Legislature could simply grant higher salaries. There would be no need or justification for compelled agency fees.

The state's interest must be something more. In *Hanson*, this Court recognized labor peace as one such interest. 351 U.S. at 233. This interest was advanced through *a process* known as collective bargaining. *Id.* This Court accepted Congress' conclusion that "free riders" posed a danger to this process that could only be avoided by union shop agreement. *Id.* at 235. Yet this Court did not allow the use of compelled fees for just any purpose. Rather, compelled fees of objectors could only be used for purposes that advanced the government interest at stake—labor peace and stability.

That type of interest is not advanced in this case. Instead, the lower court places no practical limits on the collection of compulsory fees from objecting public employees. The lower court stated:

> "When the union is acting qua union, expenses can be exacted; when it is merely an organization taking actions having no connection with the representation of the bargaining unit on employment-related matter, expenses may not be exacted." App. at A-37.

This test allows the objecting public employee to be charged for lobbying and other policy related activities as long as the activity appears to advance some employment-related interest.

To allow these charges, the lower court ignored the protections of the First Amendment and the language in *Abood* requiring that there be a close relation of the activity to the bargaining unit. *Abood*, 431 U.S. at 236. This close relation was emphasized in *Ellis* in which this Court insisted that an expenditure must be for "activities or undertakings normally or reasonably employed to implement or effectuate the duties of the union as exclusive representative of the employees in the *bargaining unit.*" *Ellis*, 466 U.S. at 448 (emphasis added). *See Keller*, 110 L. Ed. 2d at 14.

Going outside the statutory definitions, the lower court found that lobbying is necessary in the public sector because "there can be a much broader *group* of decision-makers in the management role with whom the representative of government workers must interact." App. at A-36. The lower court found support in *Abood*.

Yet, this Court in *Abood* speculated that subsequent to face-to-face negotiations in the public sector the exclusive representative might have to convince an elected body to adopt the proposed agreement. This Court also seemed to recognize that budgetary decisions impacting on bargaining in the public sector are not always made at the same time as bargaining itself. This Court has not, however, authorized the use of compelled service fees for activities that are outside the scope of bargaining, contract administration, and grievance adjustment. The lower court's decision compels an objecting nonmember employee to underwrite the costs of lobbying and policy related activities wholly unrelated to collective bargaining. This is just

too remote to justify infringing on individual First Amendment rights.

The closest analogy to lobbying is found in the *Ellis* opinion in its discussion regarding litigation expenses. There this Court determined that unless the expense of litigation directly concerns negotiating and administering the contract or settling grievance and disputes arising in the bargaining unit, objecting employees need not share the costs *because the litigation impacts the industry or protects the rights of employees generally*. *Ellis*, 466 U.S. at 453.

Rather than following the guidance of this Court in *Ellis*, the California Court of Appeal cited to the Circuit Court decision in *Lehnert* now under review for the following proposition:

> "There is a real distinction between litigation and legislation: in the former, the union can itself select the scope of employees for whom it wishes to seek redress, while in the latter, '[i]t is unrealistic to expect a union, when lobbying a state legislature for funds . . . , to lobby for monies to support each specific [bargaining unit] separately' (*Lehnert*, 881 F.2d p. at 1393); any legislature which did countenance such specifically-targeted lobbying would find itself deluged with public employee requests." App. at A-39-40.

The California Court of Appeal's decision is inconsistent with the guidance provided by this Court. This Court should grant review to resolve the question of whether lobbying activities outside the collective bargaining process and which directly impact the political process are properly chargeable to public employees who do not support the position of the labor union.

III

THE FIRST AMENDMENT QUESTION PRESENTED SHOULD BE SETTLED BY THIS COURT BECAUSE OF ITS EXCEPTIONAL IMPORTANCE AND THE CONFUSION OF THE COURTS OF APPEALS AS TO ITS RESOLUTION

This is a case of great importance to many individual public employees who cherish their individual freedoms to work without being forced, by law, to support financially an exclusive representative's political and ideological activism which, at best, is only tenuously related to its statutory duties. The importance of the fundamental rights at stake here is shown by this Court's recent granting of review in *Lehnert v. Ferris Faculty Association*, No. 89-1217. *Lehnert* raises similar issues as those presented in this petition. The Sixth Circuit had ruled that union lobbying, and other political activities to obtain funding for education generally or employment-related benefits not provided in the labor contract, were sufficiently connected to the duties of a bargaining agent representing employees in a particular bargaining unit to override the nonmembers' First Amendment rights. Here, the lower court relied on the Sixth Circuit's decision in *Lehnert* to reject petitioners' claims. App. at A-38-39.

The exceptional importance of the questions presented is due not only to the fundamental nature of the individual First Amendment rights at stake, but also to the large numbers of public employees in many states subject to agency-shop requirements.[3] If allowed to stand,

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[3] As of 1984, agency shop provisions for public employees were statutorily authorized in some 20 states. *Developments in the Law—Public Employment*, 97 Harv. L. Rev. 1611, 1727 and nn.9-12 (1984).

the lower court's expansive interpretation of the purposes for which coerced fees may constitutionally be spent could result in widespread distortion of the political and legislative processes. "Conditioning public employment on partisan support prevents support of competing political interests." *Elrod v. Burns*, 427 U.S. 347, 356 (1976). "Given the increasingly pervasive character of government employment . . . the power to starve political opposition by commanding partisan support, financial and otherwise, may have a significant [distorting] impact on the formation and expression of political beliefs." *Branti v. Finkel*, 445 U.S. 507, 513 n.8 (1980).

In *Hudson*, this Court granted certiorari due to "the divergent approaches of other courts to the issue" of the constitutionality of procedures for drawing the line between union activities that are chargeable or are not chargeable to nonunion public employees. 475 U.S. at 300. A similar divergence of approaches, if not in direct conflict, exists among the federal Courts of Appeals on the even more fundamental question of where the line should be drawn.

The decision in this case, authorizing political activities affecting employment-related matters not subject to bargaining to be charged to objecting public employers, stands in contrast to the holding of the Sixth Circuit that an exclusive representative "may collect *only for those expenses affirmatively related to the bargaining agreement* because these constitute the only expenditures that, consistent with the First and Fourteenth Amendments under *Abood* and *Hudson*, the union may collect to prevent nonmembers' 'free riding.' " *Tierney v. City of Toledo*, 824 F.2d

1497, 1505 (6th Cir. 1987) (emphasis added). It also conflicts with the ruling of the Seventh Circuit in *Hudson v. Teachers Union Local No. 1*, 743 F.2d 1187, 1193 (7th Cir. 1984), *aff'd on other grounds*, 475 U.S. 292 (1986),[4] that

> "the state cannot deprive an individual of his freedom of association by forcing him to support a union, except in accordance with procedures that reasonably assure that the deprivation will go *no further than is necessary* to prevent the individual from taking a free ride on an entity that (whether or not he wants to support it) is providing *services to him as his collective bargaining representative.*" (Emphasis added.)

Ignoring *Tierney* and *Hudson*, the California Court of Appeal relied on the Sixth Circuit's majority opinion in *Lehnert v. Ferris Faculty Association*, 881 F.2d 1388 (6th Cir. 1989), for its ruling that expenditures need not be related to the dissenters' bargaining unit to be chargeable. App. at A-39. This reliance on *Lehnert* demonstrates the importance and unsettled state of this issue despite the clear mandates of this Court's decisions in *Abood*, *Ellis*, and *Hudson*.

Also, the lower court decision seems to be in accord with the decision in *Robinson v. New Jersey*, 741 F.2d 598 (3d Cir. 1984), *cert. denied*, 469 U.S. 1228 (1985), that lobbying and other political activities affecting employment-related matters not subject to bargaining can be charged to objecting nonmembers. In contrast, the Fourth

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[4] This Court and one judge on the Seventh Circuit found it unnecessary to reach any question of what activities are constitutionally nonchargeable. *Hudson*, 475 U.S. at 304 n.13; 743 F.2d at 1197-98 (Flaum, J., concurring in the result).

Circuit in *Beck v. Communication Workers of America*, said that it "is not easy to reconcile this decision [in *Robinson*] with *Abood*." 776 F.2d 1187, 1211 n.31 (4th Cir. 1985) (dictum), *aff'd en banc*, 800 F.2d 1280 (4th Cir. 1986), *aff'd on other grounds*, 487 U.S. 735 (1988). Also the Fourth Circuit in *Beck* interpreted *Abood* as holding that service fees may not be collected for "political or lobbying purposes." 776 F.2d at 1206. This case is particularly suited to ending the lower court's confusion on the important question that it presents.

CONCLUSION

The case before this Court will impact nearly all public sector employees. The issues raised in this petition concern fundamental First Amendment rights of freedom of speech and association and the manner in which the state may intrude on those rights. The lower court's expansive construction of the scope of a labor union's activities which individuals may be compelled to subsidize as a condition of public employment repudiates First Amendment principles and sets an erroneous precedent. The importance of this issue is apparent from this Court's granting of review in *Lehnert v. Ferris Faculty*, a case

which has similar issues to the one presented in this petition. The petition for certiorari should be granted.

DATED: January, 1991.

Respectfully submitted,

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APPENDIX A

[No. C006009. Third Dist. Aug. 20, 1990.]

H. PAUL LILLEBO et al., Plaintiffs and Appellants, v. GRAY DAVIS, as Controller, etc., et al., Defendants and Respondents.

SUMMARY

Public employees brought suit against the State Controller and a state employees association challenging the ability of the Legislature to allow recognized employee organizations to exact any fair share fee from those nonunion members of the represented units desiring to exercise their right under Gov. Code, § 3515, to represent themselves. They contended that Gov. Code, § 3515.8 (return of portion of fair share fee to state employee), was unconstitutional on its face. The trial court ruled tht § 3515.8 was constitutional and did not violate plaintiffs' rights under U.S. Const., 1st Amend. It granted summary judgment in favor of defendants. The Court of Appeal affirmed the judgment. The California Supreme Court granted plaintiffs' petition for review and transferred the cause back to the Court of Appeal with directions to vacate its opinion and reconsider it in light of a United States Supreme Court opinion concerning the power of the California State Bar to use members' fees for political purposes. (Superior Court of Sacramento County, No. 311329, Ronald B. Robie, Judge.)

The Court of Appeal affirmed. It held that employees exercising the right of individual representation do not usurp the authority of the union to act as the authorized representative of the unit; thus, they may lawfully be

compelled to support its efforts on their behalf. The court held that the California Supreme Court opinion regarding fees paid by State Bar members could not be read to suggest that lobbying reasonably related to the advancement of the union's representational role may not be charged to objecting nonmembers or that all lobbying must be confined to seeking approval of a memorandum of understanding or related budgetary items. Further, the court held, Gov. Code, § 3515.8, may be read in harmony with the governing constitutional standard for refunds of fair share fees, so there is no facial invalidity. The court also held that the statutory authorization under § 3515.8 to lobby for policy goals, properly construed, is limited to activities germane to collective negotiations, contract administration, and employment benefits. So construed, the nature of public sector employment makes lobbying the Legislature for better terms and conditions of public employment or other representation-related policy goals a cost properly chargeable against objecting nonmembers in the represented unit without facially offending U.S. Const., 1st Amend. (Opinion by Sparks, J., with Puglia, P. J., and Scotland, J., concurring.)

HEADNOTES

Classified to California Digest of Official Reports, 3d Series

(1a-1c) **Labor § 17—Labor Unions—Public Employees —Fair Share Fees Paid by Nonmembers—Use of Portion for Lobbying.**—Gov. Code, § 3515.8 (return

of portion of fair share fee to state employee), permits the use of compelled fees for lobbying to further goals in collective negotiations and contract administration and to secure employment benefits. Although the penultimate sentence in that section prevents any refund for "the cost of support of lobbying activities designed to foster policy goals and collective negotiations and contract administration . . . ," the word "and" following the phrase "policy goals," is a "typographical error" that should read "in." If the amorphous "policy goals" were themselves a permissible lobbying activity that could be levied against nonmembers with no restriction on the type of policy goal, it would be an absurd contradiction of the immediate preceding sentence declaring "partisan political or ideological" activities or member-only benefits to be nonchargeable against objecting nonmembers. Further, nothing in the legislative history of the section suggests a legislative intent to authorize expenditures of compelled fees for partisan or membership purposes only when lobbying, and a literal reading of the section would cause the statute to be facially unconstitutional.

(2) **Statutes § 30—Construction—Language—Literal Interpretation.**—Courts should disregard the literal language of a statute when it would result in absurd consequences or frustrate the manifest purposes of the legislation as a whole. The mere literal construction of a section of a statute ought not to prevail if it is opposed to the intention of the Legislature apparent by the statute. While courts should not undertake to rewrite unambiguous language, that rule is

not applicable when it appears clear that a word has been erroneously used, and a judicial correction will best carry out the intent of the adopting body.

(3) **Constitutional Law § 26—Constitutionality of Legislation—Construction in Favor of Constitutionality.**—When the constitutionality of a statute is challenged, the courts first ascertain whether the statute can be reasonably construed to avoid the constitutional difficulty.

(4) **Labor § 17—Labor Unions—Public Employees—Fair Share Fees Paid by Nonmembers—Use of Portion for Lobbying—Legislature as Employer.**—When a union representing state employees is lobbying the Legislature for improvement of the conditions of employment of the members of its bargaining unit, it is fulfilling its role as a representative, and nonunion unit members benefiting from that representation should be expected to contribute toward the cost of achieving it. Although the Ralph C. Dills Act (Gov. Code, § 3512 et seq.) (state employer-employee relations), defines the "state employer" as the Governor or designated representative of the Governor (Gov. Code, § 3513, subd. (i)), there is no constitutional roadblock to including the Legislature within the concept of employer of public employees, and the Dills Act does not preclude this employer role for the Legislature. Further, a California Supreme Court opinion regarding the power of the State Bar to use members' fees for political purposes cannot be read to suggest that lobbying reasonably related to the advancement of a union's

representational role may not be charged to objecting nonmembers or that all lobbying must be confined to seeking approval of a memorandum of understanding or related budgetary items. Thus Gov. Code, § 3515.8 (return of portion of fair share fee to state employee), does not prevent a union representing state employees from using fair share fees for lobbying on matters germane to its collective bargaining role.

[See **Cal.Jur.3d,** Labor, § 104; **Am.Jur.2d,** Labor and Labor Relations, § 259.]

(5) **Labor § 17—Labor Unions—Public Employees—Fair Share Fees Paid by Nonmembers—Effect of Willingness of Members to Represent Selves.**—In an action challenging the ability of the Legislature to allow recognized state employee organizations to exact any fair share fees from nonunion members of the represented units, the trial court did not err in finding that such members could be constitutionally assessed fair share fees, notwithstanding their desire to represent themselves individually in handling their employment relations with the state. The duty imposed on the Governor to meet and confer regarding terms and conditions of employment is specifically limited to the exclusive representative (Gov. Code, § 3517), and there is no statutory right to present grievances regarding terms and conditions of employment as determined by the "meet and confer" process. Thus the individual employees at best have the right to a grievance procedure (in which the employer is bound to respond) only to the extent it is created by the contract negotiated and

administered by the union. Since all the benefits of representation nevertheless accrue to the unassociated employee, the employee becomes the free rider for whom the United States Supreme Court has said U.S. Const., 1st Amend., may be infringed to avoid.

[Employees' rights regarding use of union dues for purposes with which they disagree—Supreme Court cases, note 80 **L.Ed.2d** 898.]

(6) **Constitutional Law § 19—Constitutionality of Legislation—Raising Question of Constitutionality—Hypothetical Applications.**—To support a determination of facial unconstitutionality, voiding the statute as a whole, a plaintiff cannot prevail by suggesting that in some future hypothetical situation constitutional problems may possibly arise as to the particular application of the statute. Rather, the plaintiff must demonstrate that the provisions of the statute inevitably pose a present total and fatal conflict with applicable constitutional prohibitions. Further, where it is obvious that the statute was enacted with constitutional proscriptions in mind, this represents a considered legislative judgment that is entitled to significant weight and deference, requiring that all doubts be resolved in favor of the legislative action.

(7) **Labor § 17—Labor Unions—Public Employees—Fair Share Fees Paid by Nonmembers—Validity of Rebate Mechanism.**—In an action challenging the ability of the Legislature to allow recognized state employee organizations to exact any fair share fee from nonunion members of the represented units,

the trial court did not err in finding Gov. Code, § 3515.8 (return of portion of fair share fee to state employee), facially valid, notwithstanding plaintiffs' contention that the statute contemplates a rebate mechanism such has been condemned by United States Supreme Court cases. This argument erroneously presupposed that a fair share fee is equal to the full dues accessed against members of the union. However, a fair share fee is already a reduced fee; to the extent the fee has been miscaiculated or otherwise represents amounts impermissibly designated for partisan, ideological, or membership purposes, § 3515.8 authorizes the return of that part of the fee. The section does not specify any particular procedure for such return, and thus does not inevitably lead tc a result at odds with controlling constitutional principles.

COUNSEL

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OPINION

SPARKS, J. –

INTRODUCTION

The Ralph C. Dills Act[1] (Dills Act) (Gov. Code § 3512 et seq.) has as one of its declared purposes the establishment of "a uniform basis for recognizing the right of state employees to join organizations of their own choosing and be represented by those organizations in their employment relations with the state. It is further the purpose of this chapter, in order to foster peaceful [labor] relations, . . . to permit the exclusive representative to receive financial support from those employees who receive the benefits of this representation." (§ 3512.) To this end, the Legislature has allowed these exclusive representative[2] to include in their labor contracts a provision

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[1] Under its former name, the SEERA (or State Employer-Employee Relations Act) constituted one-third of a euphonious trio of public employment relations acts along with the Educational Employment Relations Act, or EERA (Gov. Code, § 3540 et seq.), and the Higher Education Employment Relations Act, or HEERA (Gov. Code, § 3560 et seq.), but it has since been "tombstoned" in honor of its author. (Gov. Code, § 3524; see Zerger et al., Cal. Public Sector Labor Relations (1989) §§ 1.07[2]-[4].)

All further undesignated section references are to the Government Code.

[2] We recognize that in public sector labor relations, nomenclature tends toward terms of art. For simplicity of reference, however, we shall sometimes use the unadorned expression "union" to describe the recognized employee organization designated as the exclusive representative of a particular bargaining unit of public employees (see § 3513,

(Continued on following page)

"for organizational security in the form of . . . [a] fair share fee deduction." (§ 3515.7, subd. (a).) A fair share fee deduction is defined as "the fee deducted by the state employer from the salary or wages of a state employee in an appropriate unit who does not become a member of and financially support the recognized employee organization." (§ 3513, subd. (j).) The purpose of the fee is to defray "the costs incurred by the recognized employee organization in fulfilling its duty to represent the [unit] employees in their employment relations with the state, . . . " (*Ibid.*) The Legislature, however, has also accorded these nonunion members of the represented unit the right "to demand and receive . . . a return of any part of that [fair share] fee paid . . . which represents the employee's additional pro rata share of expenditures by the [union] that is either in aid of activities or causes of a partisan political or ideological nature only incidentally related to the terms and conditions of employment, or applied towards the cost of any other benefits available only to members of the [union]." (§ 3515.8.) This refund, however, does not include costs related to certain types of lobbying. "The pro rata share subject to refund shall not reflect, however, the costs of support of lobbying activities designed to foster policy goals and collective negotiations and contract administration, or to secure for the employees represented advantages in wages, hours, and other conditions of employment in addition to those

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subds. (a), (b)) and "labor contract" as a shorthand for the written memorandum of understanding reached between the Governor and the recognized employee organization following negotiations. (See § 3517.5)

secured through meeting and conferring with the state employer." (*Ibid.*)

In this case, plaintiff H. Paul Lillebo and other public employees brought suit against the State Controller[3] and the California State Employees' Association (CSEA). The suit challenged the ability of the Legislature to allow recognized employee organizations, such as CSEA, to exact *any* fair share fee from those nonunion members of the represented unit who "desire" to exercise their statutory right "to represent themselves individually in their employment relations with the state." (§ 3515; see also § 3515.5.) Plaintiffs also raised facial constitutional challenges (1) to the mechanism set out in section 3515.8 by which objecting nonunion members of the represented unit may seek the return of that portion of their fair share fee permitted by section 3515.7 and (2) to the designation as nonrefundable in the remainder of section 3515.8 of the "costs of support of lobbying activities designed to foster policy goals and collective negotiations and contract administration, or to secure for the employees represented advantages in wages, hours, and other conditions of employment in addition to those secured through meeting and conferring with the state employer."

The trial court ruled that the challenged statutes were constitutional and did not violate plaintiffs' First Amendment rights. It therefore granted summary judgment in

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[3] This action originally named the former Controller, Kenneth Cory, as a defendant acting in his official capacity. We have substituted the present incumbent in his stead. (See 4 Witkin, Cal. Procedure (3d ed. 1985) Pleading, § 290, pp. 344-345.)

favor of defendants. Plaintiffs appealed and renewed their arguments here. Finding none of the plaintiffs' arguments to be tenable, we affirmed the judgment in our original opinion. Thereafter, the Supreme Court granted plaintiffs' petition for review and transferred the cause back to this court with directions to "vacate [our] opinion and . . . reconsider" it "in light of *Keller v. State Bar of California* (1990) 495 U.S. ___ [110 L.Ed.2d 1, 110 S.Ct. 2228]." Although *Keller* in essence merely restates the general principles of the previous cases in the particular context of the California State Bar, we have emended our opinion as instructed (after giving the parties an opportunity for comment) and now reissue it.

To reiterate the original summary of our holding, we first hold that employees exercising the right of individual representation do not usurp the authority of the union to act as the authorized representative of the unit; thus, they may lawfully be compelled to support its efforts on their behalf. Second, section 3515.8 may be read in harmony with the governing constitutional standard for refunds of fair share fees, so there is no facial invalidity. Finally, the statutory authorization under section 3515.8 to lobby for policy goals, properly construed, is limited to activities germane to collective negotiations, contract administration and employment benefits. So construed, the nature of public sector employment makes lobbying the Legislature for better terms and conditions of public employment or other representation-related policy goals a cost properly chargeable against objecting nonmembers in the represented unit without factially offending the First Amendment Consequently, we shall affirm the judgment in favor of defendants.

Background

Prior to its amendment in 1982, the SEERA authorized the state employer and recognized employee organizations, as part of a memorandum of understanding, to enter into agreements providing for organizational security in the form of "maintenance of membership" arrangements.[4] (Former § 3515; Stats. 1978, ch. 776, § 4.3.) The SEERA, however, did not provide for an organizational security arrangement whereby the public employee must either join the employee organization or pay the organization a service fee to defray its costs in representing the nonunion member.

In 1982, the Legislature for the first time authorized the state employer and recognized employee organizations to negotiate a fair share fee arrangement as part of a memorandum of understanding by amending section 3515 to its current form. (Stats. 1982, ch. 1572.) Now, once an employee organization has been recognized as the exclusive representative of an appropriate unit, "it may enter into an agreement with the state employer providing for organizational security in the form of maintenance of membership or fair share fee deduction." (§ 3515.7, subd. (a).) As we noted at the outset, a fair share fee is a

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[4] A maintenance of membership means, with an exception not relevant here, "that all employees who voluntarily are, or who voluntarily become, members of a recognized employee organization shall remain members of such employee organization in good standing for a period as agreed to by the parties pursuant to a memorandum of understanding." (§ 3513, subd. (h).)

fee deducted automatically from the salary or wages of state employees in appropriate units who do not become a member of the recognized employee organization[5] (§ 3513, subd. (j)); the state employer is required to "furnish the recognized employee organization with sufficient employment data to allow the organization to calculate membership fees and the appropriate fair share fees, and shall deduct the amount specified by the recognized employee organization from the salary or wages of every employee for the membership fee or the fair share fee. These fees shall be remitted monthly to the recognized employee organization. . . . Fair share fee deductions shall continue for the duration of the agreement, or a period of three years from the effective date of the agreement, whichever comes first"[6] (§ 3515.7, subd. (b));

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[5] The phrase "state employee" is defined to mean "any civil service employee of the state, and the teaching staff of schools under the jurisdiction of the State Department of Education or the Superintendent of Public Instruction, except managerial employees, confidential employees," and certain other designated technical personnel. (§ 3513, subd. (c).)

[6] The 1982 amendment also provides for a conscientious objection provision under which an employee with a religious or conscientious objection to joining or financially supporting an employee organization may, instead of paying the union, contribute an equal amount to a tax exempt charity. "[A]ny employee who is a member of a religious body whose traditional tenets or teachings include objections to joining or financially supporting employee organizations shall not be required to financially support the recognized employee organization. That employee, in lieu of a membership fee or a fair share fee deduction, shall instruct the employer to deduct and pay sums equal to the fair share fee to a nonreligious, nonlabor organization, charitable fund approved by the State Board of Control for receipt of charitable contributions by payroll deductions." (§ 3515.7, subd. (c).)

and the statutory scheme envisages a return of that part of the fair share fee used for partisan political or ideological purposes or for benefits available only to members of the union (§ 3515.8). These amendments became effective on January 1, 1983. (Cal. Const., art. IV, § 8, subd. (c)(1).)

In May 1983, more than 200 state employees filed a complaint against CSEA and the State Controller. CSEA is a recognized employee organization under the Dills Act. As such it negotiates employment contracts for numerous bargaining units and lobbies on behalf of them. The suit sought declaratory and injunctive relief and money damages. Following a number of procedural skirmishes, the plaintiffs received permission to file a second amended complaint in December 1986. This pleading, with a reduced plaintiffic presence of 99, had as its first cause of action a claim that section 3515.8 is unconstitutional because it allows defendant CSEA (the union currently or formerly representing the plaintiffs) to expend fair share fees on lobbying the Legislature in violation of the plaintiffs' rights under the First Amendment to the United States Constitution. For their second cause of action, numerous plaintiffs alleged they "desired to represent themselves individually in their employment relations with the state as is their right under [sections 3515 and 3515.5]," but were nevertheless required to pay the fair share fee, which violated their First Amendment rights. The third cause of action challenged the constitutionality of the "pure rebate procedure used by CSEA and mandated by Section 3515.8." Finally, the fourth cause of action challenged the propriety of defendant State Controller continuing to deduct the allegedly impermissible fair share fees from the wages of the plaintiffs.

In January 1988, the plaintiffs moved for summary judgment/summary adjudication of issues. Defendant CSEA filed a response and a cross-motion for summary judgment/summary adjudication of issues. Defendant State Controller filed a joinder in CSEA's pleadings, adding supplementary argument. The trial court filed an order in May 1988 granting the defendants' motions and denying those of the plaintiffs. Following a motion by CSEA for reconsideration of a portion of the order, the court issued its final order in June 1988. There it rejected the claim embedded in the first cause of action that the provisions of the Dills Act defining the types of lobbying expenditures chargeable as "fair share fees" to objecting nonmembers were unconstitutional on their face. "The Court concludes that requiring nonmembers to help finance the costs of lobbying by the exclusive employee representative is not *per se* unconstitutional under the standard set forth in *Ellis v. Railway Clerks* (1984) 466 U.S. 435 [80 L.Ed.2d 428, 104 S.Ct. 1883], and SEERA's authorization of the collection and expenditure of fair share fees from objectors for certain types of lobbying activities (*see* California Government Code Section 3515.8) can be interpreted and implemented in a constitutional manner." (Italics original.) By stipulation of the parties, defendants' motion as to the second cause of action was considered as a motion for judgment on the pleadings. The court then granted that motion without leave to amend for failure to state a valid cause of action. The court concluded that plaintiffs "have failed to establish any basis in Constitutional law or California law for the proposition that nonmembers who claim to represent themselves in their employment relationship with the State cannot be

required to pay fair share fees." On the third and fourth causes of action relating to the deduction of the fair share fee by the Contoller and the statutory rebate mechanism, the court similarly concluded that "the procedural provisions of California Government Code Section 3515.8 can be interpreted and applied in a constitutional manner. To arrive at the appropriate amount of the fee to be charged to objecting fee payers, including Plaintiffs, pursuant to Government Code Section 3515.7, the fee must be reduced before collection to reflect any expenditures that clearly may not constitutionally be charged to such fee payers, including member-only benefits and partisan political activities. To this extent, portions of the first sentence of Section 3515.8 become meaningless, as the portion of the fee that objecting fee payers clearly may not be compelled to pay, even temporarily, is not subject to rebate." Finally, as to the plaintiffs' motion for summary judgment on the actual procedures developed by CSEA for the collection, retention, refund and reduction of fair share fees, the court denied it "as to these 'as applied' issues for failure to state them in their motion, memorandum of points and authorities, and statement of material facts with sufficient specificity for the court to be able to render a decision."

In October 1988, the plaintiffs dismissed their claims relating to the unconstitutionality of the collection and use of the fees "as applied." In December 1988, the parties stipulated to a judgment in accord with the June order and the October dismissal, after which the plaintiffs filed this timely appeal.[7] To the extent any other facts

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[7] In addition to these parties, we have permitted amicus briefing to be filed by the California Teachers' Association.

might be relevant to the contentions, they will be incorporated in the discussion.

Discussion

I

Governing Principles

Before we reach the specific contentions in this case, it behooves us to recapitulate United States Supreme Court case law pertinent to our resolution of this appeal. We do this in order to avoid disjointed piecemeal citation of the various cases in this area and to make clear the extent to which they are based on constitutional interpretation, and thus binding on us, or merely upon statutory interpretation, which we may or may not find persuasive as applied to California's statutes.

The Abraham of this family of cases is *Railway Employes' Dept. v. Hanson* (1956) 351 U.S. 225 [100 L.Ed. 1112, 76 S.Ct. 714], in which the high court considered the facial constitutionality of an amendment to the Railway Labor Act, or RLA (45 U.S.C. § 151 et seq.). The RLA authorized employers and unions to include in their labor contracts a provision for a union shop (i.e., a requirement that all members of the bargaining unit become union members within 60 days of hire as a condition of continued employment). (351 U.S. at p. 231 & fn. 3 [100 L.Ed. at p. 1130].) The sole incident of membership authorized by the RLA was payment of periodic dues, initiation fees, and assessments. The high court found "that the requirement for financial support of the [union] by all who receive the benefits of its work . . . does not violate either

the First or Fifth Amendments." (*Id.* at p. 238 [100 L.Ed. at p. 1134].) But the court was careful to limit its holding. "If 'assessments' are in fact imposed for purposes *not germane to collective bargaining*, a different problem would be presented." (*Id.* at p. 235, fn. deleted & italics supplied [100 L.Ed. at p. 1132].) Thus, "if the exaction of dues, initiation fees, or assessments is used as a cover for forcing ideological conformity or other action in contravention of the First Amendment, this judgment will not prejudice the decision in that case." (*Id.* at p. 238 [100 L.Ed. at p. 1134].)

Such a case somewhat presented itself in *Machinists v. Street* (1961) 367 U.S. 740 [6 L.Ed.2d 1141, 81 S.Ct. 1784]. The *Street* court noted *Hanson* "decided only that [the RLA], in authorizing [union shops], did not on its face impinge upon protected rights of association." (*Id.* at pp. 746-747 [6 L.Ed.2d at p. 1148].) The record in *Street*, by contrast, "is adequate squarely to present the constitutional question reserved in *Hanson*." (*Id.* at p. 749 [6 L.Ed.2d at p. 1150].) However, the court instead interpreted the RLA as denying "the authority to a union, over the employee's objection, to spend his money for political causes which he opposes," therefore rendering unnecessary any constitutional adjudication. (*Id.* at p. 750 [6 L.Ed.2d at p. 1150].) Specifically, the court stated, "[t]he conclusion to which this [legislative] history clearly points is that [the RLA] contemplated compulsory unionism to force employees to share the costs of negotiating and administering collective agreements, and the costs of the adjustment and settlement of disputes. One looks in vain for any suggestion that Congress also meant . . . to provide the unions with a means for forcing

employees, over their objection, to support political causes which they oppose." (*Id.* at pp. 763-764 [6 L.Ed.2d at pp. 1158-1159].) This was the limit of the holding. "We express no view," the court cautioned, "as to other union expenditures objected to by an employee and not made to meet the costs of negotiation and administration of collective agreements, or the adjustment and settlement of grievances and disputes." (*Id.* at p. 769 [6 L.Ed.2d at p. 1161].)[8] On the question of remedies for the improper expenditure of exacted dues, the court suggested that both injunctive relief and restitution might be adequate. "One remedy would be an injunction against expenditure for political causes opposed by each complaining employee of a sum, from those moneys to be spent by the union for political purposes, which is so much of the moneys exacted from him as is the proportion of the union's total expenditures made for such political activities to the union's total budget. . . . A second remedy would be restitution to each individual employee of that portion of his money which the union expended, despite his notification, for the political causes to which he had advised the union he was opposed." (*Id.* at pp. 774-775 [6 L.Ed.2d at p. 1164].)

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[8] The court reiterated this distinction in *Railway Clerks v. Allen* (1963) 373 U.S. 113 [10 L.Ed.2d 235, 83 S.Ct. 1158], reversing and remanding a case for further proceedings in light of *Street*, without deciding which union expenditures were "political expenditures" and which were "germane to collective bargaining," stating "only the former, to the extent made from exacted funds of dissenters, are not authorized by [the RLA]." (*Id.* at p. 121 [10 L.Ed.2d at p. 241].)

Abood v. Detroit Board of Education (1977) 431 U.S. 209 [52 L.Ed.2d 261, 97 S.Ct. 1782] is the case most directly concerning us, so we shall dissect it at length. There the court returned to the basic question of the facial constitutionality of a variation of the union shop in the context of public employment and the constitutionality of uses of exacted dues. The case involved a Michigan statute "authorizing a system for union representation of local government employees" which included permission for the union and local government employer "to agree to an 'agency shop' arrangement, whereby every employee represented by a union—even though not a union member—must pay to the union, as a condition of employment, a service fee equal in amount to union dues." (*Id.* at p. 211 [52 L.Ed.2d at p. 269].) Reiterating its past holdings, the court stated: "To compel employees financially to support their [union] has an impact upon their First Amendment interests. . . . But the judgment clearly made in *Hanson* and *Street* is that such interference as exists is constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress." (*Id.* at p. 222 [52 L.Ed.2d at p. 276].) The court then found the Michigan Legislature had identified governmental interests similar to those underlying the RLA. (*Id.* at p. 224 [52 L.Ed.2d at p. 277].) It consequently held that "[t]he same important government interests recognized in the *Hanson* and *Street* cases presumptively support the impingement upon associational freedom created by the agency shop here at issue. Thus, insofar as the service charge is used to finance expenditures by the Union for

the purposes of collective bargaining, contract administration, and grievance adjustment, those two decisions of this Court appear to require validation of the agency-shop agreement before us." (*Id.* at pp. 225-226 [52 L.Ed.2d at p. 278].) The court also rejected arguments that public employees have a weightier First Amendment interest than private employees in not being compelled to contribute to the costs of exclusive union representation. (*Id.* at p. 229 [52 L.Ed.2d at p. 280].)

Since the Michigan Supreme Court had interpreted the Michigan statute as authorizing the use of nonunion members' fees for purposes other than collective bargaining, the Supreme Court was forced to decide the *constitutional* limits on the use of exacted dues, a question avoided in *Street*. (*Abood, supra,* 431 U.S. at pp. 232-233, 240 [52 L.Ed.2d at pp. 282-283, 287-288].) Noting it had in past held "that contributing to an organization for the purpose of spreading a political message is protected by the First Amendment" (*id.* at p. 234 [52 L.Ed.2d at p. 284]), the court reasoned that "[t]he fact that the appellants are compelled to make, rather than prohibited from making, contributions for political purposes works no less an infringement of their constitutional rights." (*Ibid.*) In sum, the Constitution does not restrict a union from *expending* funds on "causes not germane to its duties as collective-bargaining representative. Rather, the Constitution requires only that such expenditures be financed . . . by employees who do not object to advancing those ideas and who are not coerced into doing so against their will by the threat of loss of government employment." (*Id.* at pp. 235-236 [52 L.Ed.2d at pp. 284-285].)

Having identified this general constitutional barrier to the use of funds, the *Abood* court declined to apply it to the particular facts. "There will, of course, be difficult problems in drawing lines between collective-bargaining activities, for which contributions may be compelled, and ideological activities unrelated to collective bargaining, for which such compulsion is prohibited. The Court held in *Street*, as a matter of statutory construction, that a similar line must be drawn under the [RLA], but in the public sector the line may be somewhat hazier. The process of establishing a written collective-bargaining agreement prescribing the terms and conditions of public employment may require not merely concord at the bargaining table, but subsequent approval by other public authorities; related budgetary and appropriations decisions might be seen as an integral part of the bargaining process. We have no occasion in this case, however, to try to define such a dividing line." (431 U.S. at p. 236 [52 L.Ed.2d at p. 285].)

Finally, on the question of remedies, the court declared: "In determining what remedy will be appropriate if the [objectors] prove their allegations, the objective must be to devise a way of preventing compulsory subsidization of ideological activity by employees who object thereto without restricting the Union's ability to require every employee to contribute to the cost of collective-bargaining activities." (*Id.* at p. 237 [52 L.Ed.2d at p. 285].) It then reviewed the two remedies suggested in *Street* and also noted that it had suggested in *Allen* "that it would be highly desirable for unions to adopt a 'voluntary plan by which dissenters would be afforded an internal union remedy.' " (*Id.* at p. 240 [52 L.Ed.2d at p. 287].) In view of

the internal remedy newly adopted by the union, the court concluded that "it may be appropriate under Michigan law, even if not strictly required by any doctrine of exhaustion of remedies, to defer further judicial proceedings pending the voluntary utilization by the parties of that internal remedy as a possible means of settling the dispute." (*Id.* at p. 242 [52 L.Ed.2d at p. 289].) But in his concurring opinion, Justice Stevens cautioned that by joining the opinion "including its discussion of possible remedies, I do not imply—nor do I understand the Court to imply—that the remedies described in *Machinists v. Street*, 367, US 740, and *Railway Clerks v. Allen*, 373 US 113, would necessarily be adequate in this case or in any case. More specifically, the Court's opinion does not foreclose the argument that the Union should not be permitted to exact a service fee from nonmembers without first establishing a procedure which will avoid the risk that their funds will be used, even temporarily, to finance ideological activities unrelated to collective bargaining. Any final decision on the appropriate remedy must await the full development of the facts at trial." (*Id.* at p. 244, fn. & parallel citations omitted [52 L.Ed.2d at p. 290].)

In *Ellis v. Railway Clerks* (1984) 466 U.S. 435 [80 L.Ed.2d 428, 104 S.Ct. 1883] (on which the trial court relied), the high court, once again in the context of the RLA, at last adjudicated the statutory and constitutional propriety of a number of actual union expenditures, as well as the mechanism by which the dissenters could prevent their funds from being used. (*Id.* at p. 440 [80 L.Ed.2d at pp. 436-437].) Beginning with the rebate scheme the union used to refund the fees for activities to which dissenters objected, the court held "the pure rebate

approach is inadequate." (*Id.* at p. 443 [80 L.Ed.2d at p. 439].) The court stated that for a union to use and then refund the money of an objector in effect charges the objector for the unauthorized activities; the refund, even if with interest, merely minimizes the degree of the violation because it still amounts to an involuntary loan. "Given the existence of acceptable alternatives [such as advance reduction of dues and/or interest bearing escrow accounts], the union cannot be allowed to commit dissenters' funds to improper uses even temporarily." (*Id.* at p. 444 [80 L.Ed.2d at p. 439].)

Turning to the various expenditures, the court noted at the outset that to the extent it could resolve the matter as a question of what expenditures were authorized by Congress in enacting the RLA, it would not need to reach the constitutional question (466 U.S. at pp. 444-445 [80 L.Ed.2d at pp. 439-440].) While the RLA has no explicit limitation on the uses of the exacted dues (*id.* at p. 445 [80 L.Ed.2d at p. 440]), the court had previously recognized the implicit restriction against political or ideological uses and the implicit purpose of the statute: "the desire to eliminate free riders—employees in the bargaining unit on whose behalf the union was obliged to perform its statutory functions, but who refused to contribute to the cost thereof." (*Id.* at pp. 446-448 [80 L.Ed.2d at pp. 440-442].) In light of that implicit purpose, "the test must be whether the challenged expenditures are necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues." This includes not only the direct costs of "negotiating and administering a collective-bargaining

contract and of settling grievances and disputes" but also the expenses for activities which "implement or effectuate the duties of the union as exclusive representative of the employees in the bargaining unit." (*Id.* at p. 448 [80 L.Ed.2d at p. 442].) Armed with this statutory interpretation, the court then considered the various challenged costs. Conventions are essential to maintaining a union's corporate or associational existence and assist in formulating bargaining goals (*id.* at pp. 448-449 [80 L.Ed.2d at pp. 442-443]); social activities are de minimis and help create harmonious working relationships among unit members (*id.* at pp. 449-450 [80 L.Ed.2d at pp. 442-443]); and communications with unit members—to the extent they are nonideological and not political—are essential to keep them informed and educated (*id.* at pp. 450-451 [80 L.Ed.2d at pp. 442-443]), so all these costs are within the scope of the RLA. General organizing activities are not, because they are not spent on unit members and do not implicate the "free rider" problem (*id.* at pp. 451-452 [80 L.Ed.2d at pp. 443-444]), and litigation expenses, to the extent they do not directly concern unit members or are not normally conducted by the union, do not have a sufficient connection with the unit to be charged to nonunion members (*id.* at p. 453 [80 L.Ed.2d at p. 445]).[9] At last reaching the constitutionality of the three authorized categories of costs, the court declared, somewhat anticlimactically, that there was no

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[9] The court did not express any view as to death benefits, declaring that question moot. (*Id.* at pp. 453-454 [80 L.Ed.2d at pp. 445-446].)

additional infringement upon a dissenter's First Amendment rights in supporting these activities beyond the initial infringement on the right not to associate; these categories of activities simply flowed from the initial requirement the dissenter be part of a unit for collective bargaining purposes since they related to the union's work in that respect. Consequently, there was no First Amendment bar to such use. (*Id* at pp. 455-457 [80 L.Ed.2d at pp. 446-448].)

In *Teachers v. Hudson* (1986) 475 U.S. 292 [89 L.Ed.2d 232, 106 S.Ct. 1066], the court returned to the question of enforcing the rights of dissenters. "[T]his case concerns the constitutionality of the procedure adopted by the . . . Union, with the approval of the [employer], to draw that necessary line [between union expenditures that all employees must help defray and those that are not sufficiently related to collective bargaining to justify their being imposed on dissenters] and to respond to nonmembers' objections to the manner in which it was drawn." (*Id*. at p. 294 [89 L.Ed.2d at p. 239].) The procedure set up by the union in this case did not provide for advance objection to the fee deduction, although the union itself determined an amount of costs which could not be recovered from nonmembers and reduced the fee for them proportionately. No information regarding the manner in which this determination was made was provided in advance to unit members. The protest mechanism to recover fees paid had three steps, the third of which was arbitration (with the arbitrator selected and paid by union). If the objection was sustained, there was an immediate reduction in the future and a rebate of past fees paid. (*Id*. at p. 296 [89 L.Ed.2d at pp. 240-241].) As the

court framed it, the case presented two issues alone—was this procedure permissible, and did the union's subsequent adoption of an escrow system cure any flaws. (*Id.* at p. 304 [89 L.Ed.2d at pp. 245-246].) The court expressly declined to do any line-drawing regarding the types of permissible costs. (*Id.* at p. 304, fn. 13 [89 L.Ed.2d at pp. 245-246].)

With respect to the first issue, the *Hudson* court identified three flaws in the original procedure: first, the rebate procedure had been previously condemned in the concurring opinion of Justice Stevens in *Abood*; second, the union's self-imposed "advance reduction of dues" procedure was flawed, because no information was provided to unit members with respect to the manner of segregating costs; and third, there was no reasonably prompt adjudication by an impartial decisionmaker on the propriety of the union's line-drawing—the three-step process was too slow and the arbitrator was selected by the union. (*Id.* at pp. 305-308 [89 L.Ed.2d at pp. 246-248].) Thus, the dissenters' First Amendment rights were violated. (*Id.* at pp. 304, fn. 13, 309 [89 L.Ed.2d at pp. 245, 248-249].) As for the second issue, the union's subsequent adoption of an escrow procedure still left the two flaws of inadequate information with respect to the basis of the union line-drawing and the lack of prompt impartial decisionmaking. Nevertheless, the escrow "eliminates the risk that nonunion employees' contributions may be temporarily used for impermissible purposes," the flaw identified by *Abood* in pure rebate schemes. (*Id.* at p. 309 [89 L.Ed.2d at pp. 248-249].) In connection with the escrow, the court advised that "[i]f the Union chooses to escrow less than the entire amount, however, it must

carefully justify the limited escrow on the basis of [an] independent audit, and the escrow figure must itself be independently verified." (*Id.* at p. 310, fn. 23 [89 L.Ed.2d at p. 249].) In summary, the *Hudson* court held that "the constitutional requirements for the Union's collective of agency fees include an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending." (*Id.* at p. 310 [89 L.Ed.2d at p. 249].)

Communications Workers v. Beck (1988) 487 U.S. 735 [101 L.Ed.2d 634, 108 S.Ct. 2641] is the penultimate case in this lengthy recapitulation. As the court framed the issue in that case, "Today we must decide whether this provision [in the National Labor Relations Act (NLRA) permitting unions to charge nonmembers dues as a condition of employment] also permits a union, over the objections of dues-paying nonmember employees, to expend funds so collected on activities unrelated to collective bargaining, contract administration, or grievance adjustment, and, if so, whether such expenditures violate the union's duty of fair representation or the objecting employees' First Amendment rights." (*Id.* at p. 738 [101 L.Ed.2d at p. 642].) Finding the provision in the NLRA identical in all material respects to its counterpart in the RLA, the court had no trouble interpreting the statute as including the same limitations on uses of fees addressed in *Ellis*: "[O]nly those fees and dues necessary to 'performing the duties of an exclusive representative of the employees in dealing with the employer on

labor-management issues' " can be exacted of unit members. (*Id.* at pp. 662-663 [101 L.Ed.2d at p. 657].)

Finally, the Supreme Court's most recent pronouncement on this issue was in *Keller*, a case which passed through this court in the course of its lengthy judicial life. In the précis of the Chief Justice, "Petitioners, members of the State Bar of California, sued that body claiming its use of their membership dues to finance certain ideological or political activities to which they were opposed violated their rights under the First Amendment of the United States Constitution. The Supreme Court of California rejected this challenge on the grounds that respondent State Bar is a state agency, and as such may use the dues for any purpose within its broad statutory authority. We agree that lawyers admitted to practice in the State may be required to join and pay dues to the State Bar, but disagree as to the scope of permissible dues-financed activities in which respondent may engage." (495 U.S. at p. ___ [110 L.Ed.2d at p. 8].)

On the first issue, the high court held that the vote of six justices in its decision in *Lathrop v. Donohue* (1961) 367 U.S. 820 [6 L.Ed.2d 1191, 81 S.Ct. 1826]—a half-sibling of *Street, supra*, 367 U.S. 740 previously without issue—foreclosed the question of compulsory membership and financial support. (*Keller* (1990) 495 U.S. ___ [110 L.Ed.2d 1, 110 S.Ct. 2228] 495 U.S. at p. ___ [110 L.Ed.2d at p. 10].) However, the question of the *uses* to which the dues could be put had been left open and was now squarely presented by the plaintiffs. (*Id.* at p. ___ [110 L.Ed.2d at pp. 10-11].)

The high court first rejected the characterization of the State Bar as a "government agency" for purposes of First Amendment analysis. "The State Bar of California was created, not to participate in the general government of the State, but to provide specialized professional advice to those with the ultimate responsibility of governing the legal profession. Its members and officers are such not because they are citizens or voters, but because they are lawyers. We think that these differences between the State Bar, on the one hand, and traditional government agencies and officials, on the other hand, render unavailing respondent's argument that it is not subject to the same constitutional rule with respect to the use of compulsory dues *as are labor unions representing public and private employees*. (*Keller, supra,* 495 U.S. at p. ___ [110 L.Ed.2d at pp. 13-14], [italics supplied].) Relying on the standard from *Ellis* we quoted earlier, the court concluded: "We think these principles are useful guidelines for determining permissible expenditures in the present context as well. Thus, the guiding standard must be whether the challenged expenditures are necessarily or reasonably incurred for the purpose of regulating the legal profession or "improving the quality of the legal services available to the people of the State.' "[10] (*Id.* at p. ___ [110 L.Ed.2d at p. 14].)

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[10] The high court seemed to consider this standard to be more constricted than the formulation upon which the California Supreme Court relied, that of the authorizing statute. (See Bus. & Prof. Code, § 6031, subd. (a) ["all matters pertaining to the advancement of the science of jurisprudence or to the

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The *Keller* court also reaffirmed the constitutionality of the *Hudson* procedures we have just recounted at length: "In [*Hudson*], where we outlined a minimum set of procedures by which a union in an agency shop relationship could meet its requirement under *Abood*, we had a developed record. . . . We do not have any similar record here. We believe an integrated bar could certainly meet its *Abood* obligation by adopting the sort of procedures described in *Hudson*." (495 U.S. at p. ___ [110 L.Ed.2d at p. 16].)

With this historical and legal framework in mind, we turn now to the issues tendered in this appeal.

II

Costs for lobbying on matters germane to collective bargaining are proper charges.

(1a) As set up by their complaint, the plaintiffs' first challenge focuses on the penultimate sentence of section 3515.8, which prevents any refund for "the costs of support of lobbying activities designed to foster policy goals *and* collective negotiations and contract administration, or to secure for the employees represented advantages in wages, hours, and other conditions of employment in addition to those secured through meeting and conferring

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improvement of the administration of justice"].) "Simply putting this language [of the statute] alongside our previous discussion of the extent to which the activities of the State Bar may be financed from compulsory dues might suggest that there is little difference between the two. But there is a difference. . . ." (*Id.* at p. ___ [110 L.Ed.2d at p. 15].)

with the state employer." (Italics supplied.) Their claim in this respect is that section 3515.8, on its face, permits the collection and expenditure of fair share fees for lobbying activity which does not further the collective bargaining process. As plaintiffs read it, section 3515.8 allows the use of compelled fees to underwrite the costs of lobbying for policy goals which have nothing to do with collective bargaining. CSEA argues in rebuttal that the word "and" following the phrase "policy goals" was a legislative "typographical error" and should have been "in"; properly read, this section authorizes the use of fair shares fees for only "the costs of support of lobbying activities designed to foster policy goals [*in*] collective negotiations and contract administration, or to secure for the employees represented advantages in wages, hours, and other conditions of employment in addition to those secured through meeting and conferring with the state employer." Given the context of this statute and its legislative history, we are compelled to agree.

First, section 3515.8 expressly prohibits the expenditure of fair share fees by the union "in aid of activities or causes of a partisan political and ideological nature only incidentally related to the terms and conditions of employment or applied towards the costs of any other benefits available only to members of the recognized employee organization." Having explicitly barred those expenditures, it would be bizarre to construe the statute as permitting them in the guise of support for unrestricted lobbying; if the amorphous "policy goals" were themselves a permissible lobbying activity which could be levied against nonmembers with no restriction on the type of policy goal, it would be an absurd contradiction

of the immediately preceding sentence declaring "partisan political or ideological" activities or member-only benefits to be nonchargeable against objecting nonmembers.

Second, nothing in the legislative history of the section even remotely suggests a legislative intent to authorize expenditures of compelled fees for partisan or membership purposes only when lobbying. **(2)** It has been repeatedly held that courts should disregard the literal language of a statute when it would result in absurd consequences or frustrate the manifest purposes of the legislation as a whole. (See, e.g., *People v. Boyd* (1979) 24 Cal.3d 285, 294 [155 Cal.Rptr. 367, 594 P.2d 484].) "The literal meaning of the words of a statute may be disregarded to avoid absurd results or to give effect to manifest purposes that, in the light of the statute's legislative history, appear from its provisions considered as a whole." (*Silver v. Brown* (1966) 63 Cal.2d 841, 845 [48 Cal.Rptr. 609, 409 P.2d 689].) Plaintiffs' literal reading of the statute "ignores the principle that [t]he mere literal construction of a section in a statute ought not to prevail if it is opposed to the intention of the legislature apparent by the statute. . . . " (*Webster v. Superior Court* (1988) 46 Cal.3d 338, 344 [250 Cal.Rptr. 268, 758 P.2d 596], citation & internal quotation marks omitted.) As the California Supreme Court explained in the context of the mistaken use of "and" for "or," the courts in construing a statute should not undertake to rewrite its unambiguous language. "That rule is not applied, however, when it appears clear that a word has been erroneously used, and a judicial correction will best carry out the intent of the adopting body. The inadvertent use of 'and' where the

purpose or intent of the statute seems clearly to require ['in'] is a familiar example of a drafting error which may properly be rectified by judicial construction." (*People v. Skinner* (1985) 39 Cal.3d 765, 775 [217 Cal.Rptr. 685, 704 P.2d 752], citations omitted.)

(1b) Finally, the literal reading urged by the plaintiffs would inevitably cause the statute to be facially unconstitutional. **(3)** In this area, as in others, the highest court in the land has consistently stated that "[w]hen the constitutionality of a statute is challenged, this Court first ascertains whether the statute can be reasonably construed to avoid the constitutional difficulty." (*Ellis, supra*, 466 U.S. at p. 444, citations omitted [80 L.Ed.2d at p. 439].) California courts have themselves long adopted an identical rule of statutory construction. Courts must "adopt an interpretation that, consistent with the statutory language and purpose, eliminates doubts as to the provision's constitutionality." (*In re Kay* (1970) 1 Cal.3d 930, 942 [83 Cal.Rptr. 686, 464 P.2d 142], cited with approval in *People v. Davis* (1981) 29 Cal.3d 814, 829 [176 Cal.Rptr. 521, 633 P.2d 186].) **(1c)** We therefore rectify the mistaken use of the word "and" by construing it as "in." So construed, the statute permits the use of compelled fees for lobbying to further goals in collective negotiations and contract administration and to secure employment benefits.

Plaintiffs' remaining challenges to the statutory authorization for such lobbying expenditures are particularly vague. This is understandable, since they appear to concede that the Supreme Court precedent we have discussed permits recompense for lobbying which fosters the goals of negotiations and administration of the labor

contract. (4) This leaves them only the assertion they do not explicitly voice that they have ideological objections to lobbying activities by the union which obtain advantages for them in their conditions of employment.[11] They claim they cannot be compelled to support such lobbying the Legislature because this is not dealing with the employer, as the high court has phrased it in some of the above decisions, since the Dills Act defines the "state employer" as the Governor or designated representative of the Governor. (§ 3513, subd. (i).) They also suggest this lobbying is not germane to collective bargaining, again using the terminology of the high court decisions, and it cannot be assessed against them because any resulting legislation benefits state employees generally rather than members of their particular units, relying on the previously discussed analysis of litigation expenses in *Ellis*.

To begin with, their restrictive of the "employer" with whom the CSEA may constitutionally interact when supported by exacted fees has no basis in the United States Supreme Court decisions and has been undermined by the decision of the California Supreme Court in *Cumero v. Public Employment Relations Bd.* (1989) 49 Cal.3d

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[11] Although plaintiffs protest against CSEA lobbying in favor of legislation they deem odious, this ignores the fact that sections 3515.7 and 3515.8, properly construed, do prevent the plaintiffs' share of fees from being applied to "activities or causes of a partisan political or ideological nature." This also ignores the fact that whether CSEA is indeed engaging in such lobbying and whether CSEA improperly refuses to refund fees so expended are questions going to the constitutionality of the statute as applied, which is not before us by virtue of their dismissal of this aspect of their action.

575 [262 Cal.Rptr. 46, 778 P.2d 174]. Almost all the federal cases we have recounted involve *private sector* employment, where the identity of the employer with whom a union performs its duties is self-evident. *Abood*, on the other hand, which is the sole case considering a union's authorized role in the public sector, notes without deciding that there can be a much broader *group* of decisionmakers in the management role with whom the representative of government workers must interact. (431 U.S. at p. 236 [52 L.Ed.2d at p. 285].) We thus perceive no constitutional roadblock to including the Legislature within the concept of employer of public employees.

Nor does the scheme of the Dills Act preclude this employer role for the Legislature. First of all, the state employer is defined as the Governor or his designated representatives only "for the purposes of bargaining or meeting and conferring in good faith." (§ 3513, subd. (i).) Nothing in the Dills Act suggests that the Governor is the state employer for all purposes, including lobbying. Indeed, in the context of public employment negotiations, the employer/state often assumes a duality in its executive and legislative roles. As the California Supreme Court noted in *Cumero*, the "word 'state' is not expressly defined in the [Dills Act]. For the limited purpose of the duty to meet and confer in good faith with recognized employee organizations on matters within the scope of representation, the 'state employer' is defined as the Governor or his designated representative. (§§ 3513, subd. (i), 3517.) Thus, in enacting the 1982 amendment allowing unions to use nonmember state employee service fees to lobby for conditions of employment 'in addition to those

secured through meeting and conferring with the state employer' (§ 3515.8), the Legislature may well have had in mind the distinction, embedded in the [Dills Act] since 1977, between a union's specific right and duty to meet and confer with the Governor or the Governor's representative (see §§ 3513, subd. (i), 3517, 3519, subd. (c)) and the union's broader right to represent its members in employment relations with the *state* (see §§ 3512, 3515.5), including not only the executive branch but also the Legislature." (49 Cal.3d at p. 597, italics original.)

This quibble over semantics aside, it should be apparent from our summary of high court cases from *Hanson* through *Keller* that regardless of the particular way the high court may have phrased it in a given case, the test for dividing the mandatory support between chargeable and nonchargeable expenses can be boiled down to this: when the union is acting qua union, expenses can be exacted; when it is merely an organization taking actions having no connection with the representation of the bargaining unit on employment-related matter, expenses may *not* be exacted. We cannot fathom how a union's lobbying the Legislature for improvement of the conditions of employment of the members of its bargaining unit—union and nonunion alike—could not be considered to be part of its role as representative,[12] nor

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[12] This is especially so because the Legislature has said the fair share fee represents reimbursement for union activity "in fulfilling its *duty* to represent the employees in their employment relations with the state." (§ 3513, subd. (j), [italics supplied].) This is the same phraseology the *Cumero* court noted as embracing legislative lobbying (49 Cal.3d at p. 597), and the

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why a nonunion unit member benefiting from that representation should not be expected to contribute toward the cost of achieving it. This squarely implicates the essential state interest in eliminating the "free rider" problem (in order to facilitate labor peace) which justifies what might otherwise infringe upon the nonmember's constitutional rights.[13]

Despite plaintiffs' contrary contention, nothing in the recent decision in *Keller* changes this analysis. As plaintiffs read it, *Keller* prohibits the use of agency fees for lobbying activities unrelated to securing legislative approval of a collective bargaining agreement. Any additional lobbying activities, they urge, are not germane to the purpose for which compelled association was justified. Thus, so their argument goes, nonmember employees may be charged for lobbying activities only to

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scope of representation by the union generally extends to "wages, hours, and other terms and conditions of employment" under section 3516.

[13] The California Supreme Court came to the same conclusion in *Cumero* in construing the EERA. By virtue of a distinction between the EERA and the Dills Act not relevant here, the court did not find legislative authorization for independent lobbying efforts by unions on matters affecting conditions of employment, holding instead unions could do so only when asked by the employing public agency. (*Id.* at pp. 591-594.) However, when so asked, the union could charge all such expenses to objecting nonmembers without violating their rights, because under *Abood* and *Ellis* such lobbying is sufficiently related to their role as representative of a public sector unit. (*Id.* at pp. 594-595; accord *Lehnert v. Ferris Faculty Ass'n* (6th Cir. 1989) 881 F.2d 1388, 1392-1393.)

obtain approval of the memorandum of understanding or related budgetary issues.

In our view, *Keller* does not even purport to alter the general guidelines for the permissible use of compelled contributions. Consequently, it cannot be read to suggest, as plaintiffs would have it, that lobbying reasonably related to the advancement of the union's representational role may not be charged to objecting nonmembers or that all lobbying must be confined to seeking approval of the memorandum of understanding or related budgetary items.

Moreover, the succor the plaintiffs would seek in the discussion in *Ellis* about litigation expenses—in particular, the disallowance of reimbursement for litigation which generally benefits employees beyond the bargaining unit (466 U.S. at p. 453 [80 L.Ed.2d at p. 445])—is illusive. First of all, the discussion (as we have noted) was in the context of determining legislative intent on the part of Congress as to the nature of the uses to which exacted fees could be put. Here, we have express legislative authorization for such use. Moreover, to the extent the discussion of litigation expenses might have been constitutionally inspired, it is nevertheless inapposite. There is a real distinction between litigation and legislation: in the former, the union can itself select the scope of employees for whom it wishes to seek redress, while in the latter, "[i]t is unrealistic to expect a union, when lobbying a state legislature for funds . . . , to lobby for monies to support each specific [bargaining unit] separately" (*Lehnert, supra,* 881 F.2d at p. 1393); any legislature which did countenance such specifically-targeted lobbying would find itself deluged with public employee

requests. For all of these reasons, we conclude that the union may properly use fair share fees for lobbying on matters germane to its collective bargaining role.

III.

Plaintiffs desiring to represent themselves individually may be assessed a fair share fee.

(5) In the great American tradition of individualism, a number of the plaintiffs (as we have noted) alleged their desire, pursuant to sections 3515 and 3515.5, to go one-on-one with the power and majesty of the state in handling their own employment relations *without* the unwanted aegis of the union. They claim as a result they cannot constitutionally be assessed fair share fees because CSEA would be providing them with no services in return.

There is a problem at the outset with this argument: there is no allegation they ever represented or even attempted to represent themselves. Putting this glitch aside, we agree there is a surface attractiveness to this contention by the plaintiffs. The cited Supreme Court cases identify the compelling interest in labor peace as the justification for mandatory support of the efforts of a single union on behalf of a unit of employees. It would seem to follow, therefore, that if the union actually performs no services on behalf of the nonmembers the justification is absent and thus the infringement of the right to refrain from association cannot be permitted. However, this argument collapses on itself when its keystone is removed—whatever the parameters of their right of self-representation, state employees have no mechanism for

enforcement of this statutory right, which requires them by default to accept the benefits of exclusive representation.

We first dispatch the sole authority provided by the plaintiffs in support of their belief that an individual nonunion member of a represented unit may nevertheless effectively act independently of the union in employment relations with the state, so that the benefits they obtain derive from their own efforts, not from union representation. *Placentia Fire Fighters v. City of Placentia* (1976) 57 Cal.App.3d 9 [129 Cal.Rptr. 126], is a case involving the Meyers-Milias-Brown Act (MMB Act) (§ 3500 et seq.),[14] which governs labor relations for employees of all municipalities and local governmental subdivisions of the state except for public school districts (Zerger et al, *supra*, Cal. Public Sector Labor Relations, § 2.14[2], p. 2-12). This opinion talks of many things not necessary to its resolution. Lurking in the midst of ships and shoes and sealing wax is the fact the city wished to exclude two fire captains from the unit as supervisory personnel. (*Placentia Fire Fighters, supra*, 57 Cal.App. 3d at p. 16.) The city later unilaterally gave these two captains a raise. (*Id.* at p. 17.) The court then noted (in the language on which the plaintiffs would rely): "Several things are apparent from the Act: . . . [¶] There is to be only one employee representative of a unit; but a member of that unit is not required to join the representative group and may

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[14] Since we ultimately do not find *Placentia Fire Fighters* to be apposite, we have no cause to examine whether the provisions of the MMB Act sufficiently parallel those of the Dills Act to render decisions under the former analogous to the latter.

bargain directly with the public agency." (*Id.* at p. 21.) This is the extent of the analysis, and it is dictum at that. As the court itself framed it, the issue in the case was the failure of the city to meet and confer with the union in good faith (with the pay raise to the captains being evidence of bad faith), subsidiary issues being whether the classification violated the requirement of an appropriate unit or the pay raise constituted unlawful discrimination against the union. (*Id.* at p. 20.)[15] Ultimately the court held the classification was *not* evidence of bad faith (*id.* at pp. 23-24), was an appropriate parsing of supervisors from the unit under NLRA precedent (*id.* at p. 24), and no unlawful discrimination existed because the captains "were not then members of the Union, *were not within the bargaining unit as then established,* [and] were free under the Act to deal directly with City, . . . " (*Id.* at p. 25, italics supplied.) Since the men were *not* members of the bargaining unit, any discussion of their rights to deal with the employer fully independent of any representative of the unit is utter dictum.[16]

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[15] Having no desire and no need to get into the substance of these various terms of art, we are content to identify these issues without further explanation.

[16] The issue of the limits of the right to self-representation under the MMB Act was also raised in *Andrews v. Board of Supervisors* (1982) 134 Cal.App.3d 274 [184 Cal.Rptr. 542], with a nonunion member of the represented unit claiming that he was not bound by the labor agreement between the public entity employer and the union and that the employer wrongfully refused to recognize his right of self-representation on questions of conditions of employment. (*Id.* at p. 280.) However, without interpreting the reach of the statute, the court

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With no conclusive judicial authority, we look to the language of pertinent provisions of the Dills Act itself. The organizational rights of employees enumerated by the legislation include the right to form, join, and participate in unions for purposes of representation on all matters of employer-employee relations; the right to refrain from such forming, joining, and participating, "except that *nothing* shall preclude the parties from agreeing to a . . . fair share fee provision . . . . " (italics supplied); and a limitation that, "[i]n any event, state employees shall have the right to represent themselves individually in their employment relations with the state." (§ 3515.) The Dills Act also provides "once a [union] is recognized as the exclusive representative of an appropriate unit, the recognized [union] is the only organization that may represent *that unit* in employment relations with the state . . . . " (Italics supplied.) This, too, is followed by a limitation: "Nothing in this section shall prohibit any employee from *appearing* in his own behalf in his employment relations with the state." (§ 3515.5, italics added.) But what is the extent of these declared rights?

The declared purposes of the Dills Act do not aid us in supplying meaning to the individualistic portions of these Janus-like statutes, as section 3512 is entirely focused on the establishment of relations between the state employer and union, of a means for selection of unions and a means for certifying the unions as exclusive

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resolved the matter by reference to county ordinances (*id.* at pp. 280-281), which are explicitly allowed to supersede the MMB Act. (§ 3500.)

representatives of their units, and of a means for providing financial support for the unions. Not a word regarding individual representation rights appears. Nor does the Dills Act otherwise provide any affirmative delineation of these rights to "represent" or "appear" in one's own behalf.

In point of fact, the Dills Act makes quite clear what an individual employee *cannot* do effectively when part of an appropriate unit certified by the Public Employment Relations Board (PERB) (§ 3521) with an exclusive representative selected by a majority of the employees in that unit (§§ 3513, subds. (a) & (b); 3520.5). First, the duty imposed on the Governor to meet and confer regarding terms and conditions of employment is specifically limited to the exclusive representative. (§ 3517.)[17] Second, there is no statutory right to present grievances regarding terms and conditions of employment as determined by

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[17] The plaintiffs make the unavailing argument that nothing in section 3517 *prevents* the Governor from meeting and conferring with individual employees. To accept this line of reasoning would render section 3517 meaningless, because before the enactment of section 3517 there was nothing to prevent the Governor from meeting and conferring with unions, either. As the Supreme Court noted in *Pacific Legal Foundation v. Brown* (1981) 29 Cal.3d 168 [172 Cal.Rptr. 487, 624 P.2d 1215], that before the statutory creation in 1961 of a duty on the state to meet and confer with state employees under a precursor of the Dills Act, "public employees in California enjoyed no formal rights to participate in the decision-making processes which determined the terms and conditions of their employment." (*Id.* at pp. 175-176.) We therefore reject the argument.

the meet-and-confer process,[18] thus individual employees at best have the right to a grievance procedure (in which the employer is bound to respond) only to the extent it is created by the contract negotiated and administered by the union.[19] Hence, in these two primary areas, the employee might attempt to act independently, but nothing requires anyone to pay any attention. And since, as a member of the unit, all the benefits of representation nevertheless accrue to the unassociated employee, the employee becomes the free rider for whom the United States Supreme Court has said the First Amendment may be infringed to avoid. Moreover, as we have noted elsewhere, the fair share fee may be used only "to defray the costs incurred by the recognized employee organization in fulfilling its duty to represent the employees in their employment relations with the state, . . . " (§ 3513, subd. (j).) Thus, the union is mandated to use the compelled fees of nonmembers for representational purposes along. Consequently, even those members of the unit who are not union members and who do not desire the benefits of union representation are nevertheless beneficiaries and may properly be assessed fair share fees.

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[18] We are not concerned with the extent to which state civil service employees have rights independent of the contract governing their unit.

[19] It is possible section 3515.5 would entitle employees to appear in their own behalf at whatever proceeding is authorized by the contract, including any arbitration invoked by the union or employer, but that is not an area we need explore because, even if so, the employees are nevertheless benefiting from the procedure exacted by the union from the employer.

IV

Section 3515.8 is not facially unconstitutional on the other grounds asserted by plaintiffs.

A.

The plaintiffs, next contend that it exceeds the bounds of judicial discretion to choose, as the trial court did, "to rewrite" section 3515.8 in order to avoid finding the plain meaning of the demand and return provisions unconstitutional. As they see it, the rebate scheme authorized in section 3515.8 is the type of procedure found unconstitutional in *Ellis* and *Hudson*. They claim the section is unconstitutional on its face because it allows the union to collect a compelled fee and months later rebate to the objecting employee that amount which it was clearly unauthorized to collect in the first place.

The plaintiffs shoulder a heavy burden in asserting the facial unconstitutionality of a statute. **(6)** "To support a determination of facial unconstitutionality, voiding the statute as a whole, petitioners cannot prevail by suggesting that in some future hypothetical situation constitutional problems may possibly arise as to the particular application of the statute, . . . Rather, petitioners must demonstrate that the act's provisions *inevitably* pose a present total and fatal conflict with applicable constitutional prohibitions." (*Pacific Legal Foundation, supra,* 29 Cal.3d at pp. 180-181, italics altered; accord *California State Employees' Assn. v. State of California* (1988) 199 Cal.App.3d 840, 846 [245 Cal. Rptr. 232].) Moreover, where it is obvious, as it is here, that the statute in question was enacted with constitutional prescriptions in mind, this represents a considered legislative judgment which is entitled to significant weight and deference

(*Pacific Legal Foundation, supra,* 29 Cal.3d at p. 180), requiring we resolve all doubts in favor of the legislative action (*California State Employees' Assn., supra,* 199 Cal.App.3d at p. 846.)

B.

(7) With respect to the adequacy of the refund mechanism, the plaintiffs seize upon the opening phrase in section 3515.8—"Any state employee who pays a fair share fee shall have the right *to demand and receive . . . a return* of any part of that fee. . . . "[20] (Italics supplied.)

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[20] To reiterate, section 3515.8 reads in its entirety: "Any state employee who pays a fair share fee shall have the right to demand and receive from the recognized employee organization, under procedures established by the recognized employee organization, a return of any part of that fee paid by him or her which represents the employee's additional pro rata share of expenditures by the recognized employee organization that is either in aid of activities or causes of a partisan political or ideological nature only incidentally related to the terms and conditions of employment, or applied towards the cost of any other benefits available only to members of the recognized employee organization. The pro rata share subject to refund shall not reflect, however, the costs of support of lobbying activities designed to foster policy goals and collective negotiations and contract administration, or to secure for the employees represented advantages in wages, hours, and other conditions of employment in addition to those secured through meeting and conferring with the state employer. The board may compel the recognized employee organization to return that portion of a fair share fee which the board may determine to be subject to refund under the provisions of this section."

They then assert that the statute mandates a rebate mechanism, which has been condemned in both *Ellis* and *Hudson*. The plaintiffs insist the statute can be interpreted no other way without engaging in judicial legislation (*Metromedia, Inc. v. City of San Diego* (1982) 32 Cal.3d 180, 187 [185 Cal.Rptr. 260, 649 P.2d 902].) Such is hardly the case.

As plaintiffs read it, this section allows state employees under the Dills Act the right to a refund of misspent fees rather than a reduction in the fee. Plaintiffs' argument erroneously presupposes that a fair share fee is equal to the full dues assessed against members of the union. On that erroneous assumption, plaintiffs classify the statutory procedure as a pure rebate system of the type struck down in *Ellis*. "By exacting and using full dues, then refunding months later the portion that it was not allowed to exact in the first place, the union effectively charges the employees for activities that are outside the scope of the statutory portion authorization." (*Ellis, supra,* 466 U.S. at p. 444 [80 L.Ed.2d at p. 439].) Thus, the union improperly "obtains an involuntary loan for purposes to which the employee objects." (*Ibid.*) To overcome this constitutional hurdle, the trial court ruled that "the fee must be reduced before collection to reflect any expenditures that clearly may not constitutionally be charged to such fee payers, including members-only benefits and partisan political activities. To this extent, portions of the first sentence of Section 3515.8 become[ ] meaningless, as the portion of the fee that objecting fee payers clearly may not be compelled to pay, even temporarily, is not subject to rebate." In plaintiffs' view, the trial court has abused its discretion by building an impossibly

convoluted and unworkable structure upon a foundation of sand.

Both the trial court and the plaintiffs overlook the fact that, by definition, a fair share fee is already a reduced fee. It may be calculated only in such amount as may "defray the costs incurred by the recognized employee organization in fulfilling its duty to represent the employees in their employment relations with the state, . . . " (§ 3513, subd. (j).) To the extent that the fair share fee has been miscalculated or otherwise represents amounts impermissibly designated for partisan, ideological, or membership purposes, section 3515.8 authorizes the return of that part of the fee.

It is to be anticipated that objecting nonmembers may dispute the manner in which the fair share fee was calculated. It is for this reason that some portion of the fee must be placed in escrow as required by *Ellis* and *Hudson* and suggested in *Keller*.[21] Obviously the Legislature could

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[21] In *Hudson*, the high court noted that it "need not hold, however, that a 100% escrow is constitutionally required. Such a remedy has the serious defect of depriving the Union of access to some escrowed funds that it is unquestionably entitled to retain. If, for example, the original disclosure by the Union had included a certified public accountant's verified breakdown of expenditures, including some catergories that no dissenter could reasonably challenge, there would be no reason to escrow the portion of the nonmember's fees that would be represented by those categories." (*Hudson, supra*, 475 U.S. at p. 310, fn. omitted [89 L.Ed.2d at p. 249].) In California, under regulations promulgated by the PERB and currently subject to challenge, the union, after having notified the nonmember what percentage the fair share fee represents annual dues

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not have had either *Ellis* or *Hudson* in mind, as the cases were decided after the statute was enacted in 1982. It is possible the Legislature indeed contemplated a rebate mechanism, because the United States Supreme Court pointed out in *Ellis* that "there is language in this Court's cases to support the validity of a rebate program." (466 U.S. at p. 443 [80 L.Ed.2d at p. 438].) But that does not matter, because the statute does *not* specify any particular procedure. Instead, it directs that the return of the fee shall be "under procedures established by the recognized employee organization." (§ 3515.8.) At best, the statutory language merely suggests a union has the power first to collect the reduced fee before a dissenter may get it back, and indeed such a practice would be permissible if the union placed a portion of the collected fee in an interest-bearing escrow account as endorsed by *Hudson*.[22] In point of fact, as we have noted, the PERB promulgated regulations effective in April 1989 *requiring* fair share fees subject to challenge to be deposited in an interest-bearing escrow. (Cal. Code Regs., tit. 8, § 32995, p. 2066.5.) The regulation, among other things, requires the union to notify the nonmember of the "amount of the

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assessed members and the basis of the calculation, must place the fees collected from protesting members in an interest-bearing escrow subject to distribution pursuant to an appeal procedure. (Cal. Code Regs., tit. 8, §§ 32991, 32994, 32995, pp. 2066.3-2066.5.)

[22] The California Supreme Court, in considering the agency fee question in the context of the EERA, has held the rights of dissenting nonmembers are protected when amounts reasonably in dispute are escrowed pending resolution of the issue. (*Cumero, supra*, 49 Cal.3d at p. 590.)

agency fee which is to be expressed as a percentage of the annual dues per member based upon the chargeable expenditures identified in the notice." (Cal. Code Regs., tit. 8, § 32992, subd. (a)(1).) As this implementing administrative directive indicates, the provisions of section 3515.8 do not *inevitably* lead to a result at odds with the controlling constitutional principles we have recounted. Plaintiffs' challenge to the facial validity of the refund procedure must fail.

DISPOSITION

The judgment is affirmed.

Puglia, P.J., and Scotland, J., concurred.

APPENDIX B

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SACRAMENTO

H. PAUL LILLEBO; et al., Plaintiffs, v. KENNETH CORY, in his official capacity as the Controller of the State of California; and CALIFORNIA STATE EMPLOYEES' ASSOCIATION, Defendants.	No. 311329 JUDGMENT (Endorsed Dec. 15, 1988)

Judgment is entered in the above entitled cause in favor of defendants, consistent with the partial dismissal filed with this Court on October 28, 1988, and the June 21, 1988, decision by the Honorable Ronald B. Robie, a copy of which is attached hereto and is by this reference incorporated herein as if set forth in full at this place.

DATED: DEC 15 1988.

ATTEST:
Joyce Russell Smith, Clerk SEAL

By (illegible)
Deputy Clerk

RONALD B. ROBIE
Judge of the
Superior Court

Approved as to form:

RONALD A. ZUMBRUN
ANTHONY T. CASO
SHARON L. BROWNE

DATED: Nov. 8, 1988.

By Sharon L. Browne
SHARON L. BROWNE
Attorneys for Plaintiffs

DATED: Nov. 28, 1988.

/s/ Howard Schwartz
HOWARD SCHWARTZ
Attorney for California
State Employees' Association

JOHN K. VAN DE KAMP
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DATED: Dec. 7, 1988.

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SACRAMENTO

H. PAUL LILLEBO, et al., Plaintiffs, v. KENNETH CORY, in his official capacity as the Controller of the State of California; and CALIFORNIA STATE EMPLOYEES' ASSOCIATION, Defendants.	CASE NO. 311329 [PROPOSED] ORDER (Endorsed June 21, 1988)

The motion of Plaintiffs for summary judgment or summary adjudication of issues (hereinafter "Plaintiffs' motion") and the cross-motion of Defendant California State Employees' Association ("CSEA") for summary judgment or summary adjudication of issues (hereinafter "Defendants' motion," as it was joined in by the other

named defendant, the Controller of the State of California (the "State Controller")), came on regularly for hearing on February 29, 1988 before the Honorable Ronald B. Robie in Department 27. Sharon L. Browne and Anthony T. Caso appeared for Plaintiffs, Bradley G. Booth and Frank E. Melton appeared for CSEA, and Ramon M. de la Guardia appeared for the State Controller.

Having reviewed and considered the papers filed in support of and in opposition to Plaintiffs' and Defendants' motions, both of which were filed pursuant to California Code of Civil Procedure Section 437c, as well as the pleadings and other documents in the file, and having heard the oral arguments of counsel at the hearing, the Court ordered, adjudged and decreed Defendants' motion be granted in its entirety and Plaintiffs' motion be denied in its entirety, as setforth in its Order signed and filed on May 31, 1988. CSEA subsequently moved for reconsideration of the language of paragraph three of that Order, and the Court after considering the briefs filed and the arguments of counsel at hearing on June 21, 1988, hereby grants CSEA's motion for reconsideration and revises the terms of its Order of May 31, 1988 to read as follows:

1. Defendants' motion is granted as to the First Cause of Action of Plaintiffs' Second Amended Complaint, which alleges that the provisions of the State Employer-Employee Relations Act ("SEERA") defining the types of expenditures chargeable as "fair share fees" to objecting non-members are unconstitutional on their face. The Court concludes that requiring non-members to help finance the costs of lobbying by the exclusive

employee representative is not *per se* unconstitutional under the standards set forth in *Ellis v. Railway Clerks* (1984) 466 U.S. 435, and SEERA's authorization of the collection and expenditure of fair share fees from objectors for certain types of lobbying activities (*see* California Government Code Section 3515.8) can be interpreted and implemented in a constitutional manner. Accordingly, the portion of Plaintiffs' motion pertaining to this issue is denied.

2. Defendants' motion as to the Second Cause of Action of Plaintiffs' Second Amended Complaint is, by stipulation of the parties, considered by the Court to be a motion for judgment on the pleadings. As such, it is granted without leave to amend for failure to state a valid cause of action. Plaintiffs have failed to establish any basis in Constitutional law or California law for the proposition that non-members who claim to represent themselves in their employment relationship with the State cannot be required to pay fair share fees. The portion of Plaintiffs' motion pertaining to this issue is, accordingly, denied.

3. Defendants' motion is granted as to the Third Cause of Action of Plaintiffs' Second Amended Complaint, insofar as said cause of action alleges that the demand and return procedures referenced in California Government Code Section 3515.8 are unconstitutional on their face. The Court concludes that the procedural provisions of California Government Code Section 3515.8 can be interpreted and applied in a constitutional manner. To arrive at the appropriate amount of the fee to be charged to objecting fee payers, including Plaintiffs, pursuant to Government Code Section 3515.7, the fee must be

reduced before collection to reflect any expenditures that clearly may not constitutionally be charged to such fee payers, including member-only benefits and partisan political activities. To this extent, portions of the first sentence of Section 3515.8 becomes meaningless, as the portion of the fee that objecting fee payers clearly may not be compelled to pay, even temporarily, is not subject to rebate. [*Ellis v. Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers and Express Station Employees* (1984) 466 U.S. 435; *Chicago Teachers Union v. Husdon* (1986) 475 U.S. 292, 89 L.Ed.2d 232; *Tierney v. City of Toledo* (6th Cir. 1987) 824 F.2d 1497; *Robinson v. State of New Jersey* (3rd Cir. 1986) 806 F.2d 442, *cert. denied,* (1987) 107 S.Ct. 2463. Accordingly, the portion of Plaintiffs' motion pertaining to this issue is denied.

4. The remainder of Plaintiffs' motion asserts that procedures developed by CSEA for the collection, retention, refund, and reduction of fair share fees from Plaintiffs since 1983 do not comport with applicable constitutional procedures. Plaintiffs' motion is denied as to these "as applied" issues for failure to state them in their motion, memorandum of points and authorities, and statement of material facts with sufficient specificity for the court to be able to render a decision.

5. In light of the foregoing, Plaintiffs' counsel at hearing represented to the Court that the only remaining issues to be tried are whether CSEA's fair share fee procedures in their various forms from 1983 to the present have complied with applicable constitutional precedents.

IT IS SO ORDERED.

DATED: JUN 21 1988

RONALD B. ROBIE

THE HONORABLE
RONALD B. ROBIE
JUDGE OF THE
SUPERIOR COURT

APPENDIX C

ORDER DENYING REVIEW

AFTER JUDGMENT BY THE COURT OF APPEAL

Third Appellate District No. C006009
S015378

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK
(Filed Oct. 30, 1990)

H. PAUL LILLEBO Et Al., Appellants

v.

GRAY DAVIS Et Al., Respondents

Appellants' petition for review DENIED.

Lucas
Chief Justice

APPENDIX D

UNITED STATES CONSTITUTION, AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

UNITED STATES CONSTITUTION, AMENDMENT XIV

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SELECTED PROVISIONS OF THE RALPH C. DILLS ACT CALIFORNIA GOVERNMENT CODE

§ 3512. Purpose of chapter

It is the purpose of this chapter to promote full communication between the state and its employees by providing a reasonable method of resolving disputes regarding wages, hours, and other terms and conditions

of employment between the state and public employee organizations. It is also the purpose of this chapter to promote the improvement of personnel management and *employer-employee* relations within the State of California by providing a uniform basis for recognizing the right of state employees to join organizations of their own choosing and be represented by *those* organizations in their employment relations with the state. *It is further the purpose of this chapter, in order to foster peaceful employer-employee relations, to allow state employees to select one employee organization as the exclusive representative of the employees in an appropriate unit, and to permit the exclusive representative to receive financial support from those employees who receive the benefits of this representation.*

Nothing in this chapter shall be construed to contravene the spirit or intent of the merit principle in state employment, nor to limit the entitlements of state civil service employees, including those designated as managerial and confidential, provided by Article VII of the California Constitution or by laws or rules enacted pursuant thereto.

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§ 3513. Definitions

As used in this chapter:

(a) "Employee organization" means any organization which includes employees of the state which has as one of its primary purposes representing these employees in their relations with state.

(b) "Recognized employee organization" means an employee organization which has been recognized by the state as the exclusive representative of the employees in an appropriate unit.

(c) "State employee" means any civil service employee of the state, and the teaching staff of schools under the jurisdiction of the State Department of Education or the Superintendent of Public Instruction, except managerial employees, confidential employees, employees of the Department of Personnel Administration, professional employees of the Department of Finance engaged in technical or analytical state budget preparation other than the auditing staff, *Professional employees in the Personnel/Payroll Services Division of the Controller's office engaged in technical or analytical duties in support of the state's personnel and payroll systems other than the training staff,* employees of the Legislative Counsel Bureau, employees of the board, conciliators employed by the State Conciliation Service within the Department of Industrial Relations, and intermittent athletic inspectors who are employees of the State Athletic Commission.

(d) "Mediation" means effort by an impartial third party to assist in reconciling a dispute regarding wages, hours and other terms and conditions of employment between representatives of the public agency and the recognized employee organization or recognized employee organizations through interpretation, suggestion and advice.

(e) "Managerial employee" means any employee having significant responsibilities for formulating or

administering agency or departmental policies and programs or administering an agency or department.

(f) "Confidential employee" means any employee who is required to develop or present management positions with respect to employer-employee relations or whose duties normally require access to confidential information contributing significantly to the development of management positions.

(g) "Board" means the Public Employment Relations Board. The Educational Employment Relations Board established pursuant to Section 3541 shall be renamed the Public Employment Relations Board as provided in Section 3540. The powers and duties of the board described in Section 3541.3 shall also apply, as appropriate, to this chapter.

(h) "Maintenance of membership" means that all employees who voluntarily are, or who voluntarily become, members of a recognized employee organization shall remain members of such employee organization in good standing for a period as agreed to by the parties pursuant to a memorandum of understanding, commencing with the effective date of the memorandum of understanding. A maintenance of membership provision shall not apply to any employee who within 30 days prior to the expiration of the memorandum of understanding withdraws from the employee organization by sending a signed withdrawal letter to the employee organization and a copy to the State Controller's office.

(i) "State employer," or "employer," for the purposes of bargaining or meeting and conferring in good

faith, means the Governor or his or her designated representatives.

(j) "Fair share fee" means the fee deducted by the state employer from the salary or wages of a state employee in an appropriate unit who does not become a member of and financially support the recognized employee organization. The fair share fee shall be used to defray the costs incurred by the recognized employee organization in fulfilling its duty to represent the employees in their employment relations with the state, and shall not exceed the standard initiation fee, membership dues, and general assessments of the recognized employee organization.

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§ 3515.7. Maintenance of membership or fair share fee deduction

(a) Once an employee organization is recognized as the exclusive representative of an appropriate unit it may enter into an agreement with the state employer providing for organizational security in the form of maintenance of membership or fair share fee deduction.

(b) The state employer shall furnish the recognized employee organization with sufficient employment data to allow the organization to calculate membership fees and the appropriate fair share fees, and shall deduct the amount specified by the recognized employee organization from the salary or wages of every employee for the membership fee or the fair share fee. These fees shall be remitted monthly to the recognized employee organization along with an adequate itemized record of the deductions, including, if required by the recognized

employee organization, machine readable data. Fair share fee deductions shall continue for the duration of the agreement, or a period of three years from the effective date of the agreement, whichever comes first. The Controller shall retain, from the fair share fee deduction, an amount equal to the cost of administering the provisions of this section. The state employer shall not be liable in any action by a state employee seeking recovery of, or damages for, improper use or calculation of fair share fees.

(c) Notwithstanding subdivision (b), any employee who is a member of a religious body whose traditional tenets or teachings include objections to joining or financially supporting employee organizations shall not be required to financially support the recognized employee organization. That employee, in lieu of a membership fee or a fair share fee deduction, shall instruct the employer to deduct and pay sums equal to the fair share fee to a nonreligious, nonlabor organization, charitable fund approved by the State Board of Control for receipt of charitable contributions by payroll deductions.

(d) A fair share fee provision in a memorandum of understanding which is in effect may be rescinded by a majority vote of all the employees in the unit covered by the memorandum of understanding, provided that: (1) a request for such a vote is supported by a petition containing the signatures of at least 30 percent of the employees in the unit; (2) the vote is by secret ballot; (3) the vote may be taken at anytime during the term of the memorandum of understanding, but in no event shall there be more than one vote taken during the term. If the board determines that the appropriate number of signatures

have been collected, it shall conduct the vote in a manner which it shall prescribe. Notwithstanding this subdivision, the state employer and the recognized employee organization may negotiate, and by mutual agreement provide for, an alternative procedure or procedures regarding a vote on a fair share fee provision.

(e) Every recognized employee organization which has agreed to a fair share fee provision shall keep an adequate itemized record of its financial transactions and shall make available annually, to the board and to the employees in the unit, within 90 days after the end of its fiscal year, a detailed written financial report thereof in the form of a balance sheet and an operating statement, certified as to accuracy by its president and treasurer or comparable officers. In the event of failure of compliance with this section, any employee in the unit may petition the board for an order compelling this compliance, or the board may issue a compliance order on its own motion.

(f) If an employee who holds conscientious objections pursuant to subdivision (c) requests individual representation in a grievance, arbitration, or administrative hearing from the recognized employee organization, the recognized employee organization is authorized to charge the employee for the reasonable cost of the representation.

(g) An employee who pays a fair share fee shall be entitled to fair and impartial representation by the recognized employee organization. A breach of this duty shall be deemed to have occurred if the employee organization's conduct in representation is arbitrary, discriminatory, or in bad faith.

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§ 3515.8. Return of part of fair share fee

Any state employee who pays a fair share fee shall have the right to demand and receive from the recognized employee organization, under procedures established by the recognized employee organization, a return of any part of that fee paid by him or her which represents the employee's additional pro rate share of expenditures by the recognized employee organization that is either in aid of activities or causes of a partisan political or ideological nature only incidentally related to the terms and conditions of employment, or applied towards the cost of any other benefits available only to members of the recognized employee organization. The pro rata share subject to refund shall not reflect, however, the costs of support of lobbying activities designed to foster policy goals and collective negotiations and contract administration, or to secure for the employees represented advantages in wages, hours, and other conditions of employment in addition to those secured through meeting and conferring with the state employer. The board may compel the recognized employee organization to return that portion of a fair share fee which the board may determine to be subject to refund under the provisions of this section.

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§ 3517. Meet and confer in good faith

The Governor, or his representative as may be properly designated by law, shall meet and confer in good

faith regarding wages, hours, and other terms and conditions of employment with representatives of recognized employee organizations, and shall consider fully such presentations as are made by the employee organization on behalf of its members prior to arriving at a determination of policy or course of action.

"Meet and confer in good faith" means that the Governor or such representatives as the Governor may designate, and representatives of recognized employee organizations, shall have the mutual obligation personally to meet and confer promptly upon request by either party and continue for a reasonable period of time in order to exchange freely information, opinions, and proposals, and to endeavor to reach agreement on matters within the scope of representation prior to the adoption by the state of its final budget for the ensuing year. The process should include adequate time for the resolution of impasses.

(Added by Stats. 1977, c. 1159, p. 3754, § 4, operative July 1, 1978.)

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§ 3517.5. Written memorandum of understanding; legislative determination

If agreement is reached between the Governor and the recognized employee organization, they shall jointly prepare a written memorandum of such understanding which shall be presented, when appropriate, to the Legislature for determination.

(Added by Stats. 1977, c. 1159, p. 3754, § 4, operative July 1, 1978.)

APPENDIX E

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Attorneys for Plaintiffs

IN THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SACRAMENTO

H. PAUL LILLEBO; HELEN BEGOVICH; MELODY BOWDEN; JOAN BRANDLI; SALLY BROWN; PAMELA BROYLES; LINDA L. CASE RAINEY; MARY ANN COMADURAN; SHIRLEY CORTELL; LAUREL DAILEY; DENNIS B. WARD; EUGENE M. DELEON; SONJA A. DELAGADO; GRETA DUMAGUINDIN; SUE A. EAGEN; KATHERINE FELION; ESTHER M. FRANCO; MARY HART; KAROL HILDEBRAND; FRANCES M. JONES; JACQUELYN F. KELLEY; WILLIAM K. LEE; NANCY G. LUM; WILLIAM J. LYNN; ELVERA MALDANADO; MARILYN MARCHETTI; SHIRLEY J. MARTUCCI; CONNIE S. MATHEWS; ISAIAS R. MALLARI; MADELEINE L. OWYANG; PETER PANOS;	No. 311329 SECOND AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF AND MONEY DAMAGES (Endorsed Dec. 11, 1986)

JANICE PETERSON BUHLER;)
LUCIA G. QUESADA;)
KATHLEEN A. SANTOS;)
DORIS J. VALDRY;)
MARY L. VANACORE; HARRY T.)
VAN FOSSEN; J. WEAVER; ELLI)
WONG; BARBARA BABICH;)
HARRY BAERTSCHI; DEBI S.)
BANKS; GRACE BARRELL;)
MAGDA BEUTEL; JEANNE)
BICKFORD; DANNIE BREGMAN;)
GERALDINE C. BUEHLER;)
KATHY CASADO; LYNN)
CHAMPOMIER; JAMES Q. COE;)
DAVID G. COWAN; CHRISTINE)
CUMMINGS; FREDRICK P.)
DeROSE; ALAN GIORGI;)
GERALD D. GORDON; JAMES J.)
HANOCEK; HARLEY HANSEN,)
JR.; DEBRA HENINGER;)
THOMAS HUGHES; ROBERT F.)
HUNT; MARILYN KEHLET;)
SUSANNA KONG; TITO KUMAR;)
DAVID L. KUPPER; DION E.)
WEBB; JANET I. WEBB;)
HELEN LAUX; GEORGIA L.)
LIPPHARDT; HUGH C. LOWE;)
CLEMENT L. MANSION, JR.;)
MARTHA MILLER; ANTHONY G.)
MUNSO; KAYLYN NAFUS)
WARREN; MARIANNE NIXON;)
ROBERT L. RIFFLE;)
STEVEN R. SANABRIA; MARY)
SHIRO; DANIEL STEDMAN;)
PAULA B. STEIMAN; JAMES D.)
STRUTTON; F. C. SUTLIFF;)
HAZEL WAMBOLT; JOHN M.)
WOODBURY; KEITH C.)
WORK; FRED LaCARO; DEL)
RASMUSSEN; PHIL ZENTNER;)

ESLIE ALTER; KEITH L. SPEAR;)
ORINE H. CREEL; FREDERICK)
UGE; RHANE VENNES;)
SANDRA P. ORTEGA;)
CATHLEEN M. FLOHR;)
LYNNE GOUTERMONT;)
DENNIS A. HERBERT;)
KATHY MOORE; BILL)
NAKATA; and LINDA RAINS;)
)
Plaintiffs,)
)
v.)
)
KENNETH CORY, in his official)
capacity as the Controller of the)
State of California; and)
CALIFORNIA STATE)
EMPLOYEES' ASSOCIATION,)
)
Defendants.)

INTRODUCTION

1. This is an action by 99 current and former employees of the State of California to declare Government Code §§ 3512, 3513(j), 3515, 3515.7, and 3515.8 unconstitutional and violative of plaintiffs' rights under 42 U.S.C. § 1983, United States Constitution Amendments I and XIV, and California Constitution Article I, Sections 1, 2, and 3, to enjoin Kenneth Cory, in his official capacity as controller of the State of California, from enforcing those provisions or otherwise reducing the wages of plaintiffs without their consent for the benefit of a private association; and to compel the California State Employees' Association (CSEA) to return moneys that defendant Cory has already deducted from plaintiffs' wages on behalf of CSEA.

2. Plaintiffs invoke the jurisdiction of this Court to halt the profound violation of fundamental First Amendment rights and far-reaching and grievous injury to the public welfare. With the enactment of Chapter 1572 of the Statutes of 1982, the Legislature purports to authorize compelled political action contributions as a condition of state employment and grants a quasi-taxing power to private associations to finance lobbying activities that urge a raid on the public fisc. With the passage of this law, thousands of state employees with no desire to associate with or to finance the political activities of private associations have suffered an involuntary reduction in their salary—which money is then delivered by the state to these associations. Although the stated rationale of this compelled association and financial support is to support the activities of the "exclusive" collective bargaining representative, no such "exclusive" representative in fact exists. The State Employer-Employee Relations Act (Gov't Code § 3512, *et seq.*) expressly reserves the right of self-representation for individual employees. In spite of this lack of even a rational governmental justification, the Legislature has expressly authorized these private associations to expend these compelled "donations" to lobby elected officials for purposes other than ratification of the collective bargaining agreement. To compel thousands of state employees to "donate" to the political action funds of private associations is a serious violation of fundamental First and Fourteenth Amendment rights to be free from compelled political speech and association.

PARTIES

3. Plaintiffs to this action are as follows: H. Paul Lillebo, Helen Begovich, Melody Bowden, Joan Brandli,

Sally Brown, Pamela Broyles, Linda L. Case Rainey, Mary Ann Comaduran, Shirley Cortell, Laurel Dailey, Dennis B. Ward, Eugene M. Deleon, Sonja A. Delgado, Greta Dumaguindin, Sue A. Eagen, Katherine Felion, Esther M. Franco, Mary Hart, Karol Hildebrand, Frances M. Jones, Jacquelyn F. Kelley, William K. Lee, Nancy G. Lum, William J. Lynn, Elvera Maldanado, Marilyn Marchetti, Shirley J. Martucci, Connie S. Mathews, Isaias R. Mallari, Madeleine L. Owyang, Peter Panos, Janice Peterson Buhler, Lucia G. Quesada, Kathleen A. Santos, Doris J. Valdry, Mary L. Vanacore, Harry T. Van Fossen, J. Weaver, Elli Wong, Barbara Babich, Harry Baertschi, Debi S. Banks, Grace Barrell, Magda Beutel, Jeanne Bickford, Dannie Bregman, Geraldine C. Buehler, Kathy Casado, Lynn Champomier, James Q. Coe, David G. Cowan, Christine Cummings, Fredrick P. DeRose, Alan Giorgi, Gerald D. Gordon, James J. Hanocek, Harley Hansen, Jr., Debra Heninger, Thomas Hughes, Robert F. Hunt, Marilyn Kehlet, Susanna Kong, Tito Kumar, David L. Kupper, Dion E. Webb, Janet I. Webb, Helen Laux, Georgia L. Lipphardt, Hugh C. Lowe, Clement L. Mansion, Jr., Martha Miller, Anthony G. Munso, Kaylyn Nafus Warren, Marianne Nixon, Robert L. Riffle, Steven R. Sanabria, Mary Shiro, Daniel Stedman, Paula B. Steiman, James D. Strutton, F. C. Sutliff, Hazel Wambolt, John M. Woodbury, Keith C. Work, Fred LaCaro, Del Rasmussen, Phil Zentner, Leslie Alter Billington, Keith L. Spear, Corine H. Creel, Frederick Ruge, Rhane Vennes, Sandra P. Ortega, Cathleen M. Flohr, Lynne Goutermont, Dennis A. Herbert, Kathy Moore, Bill Nakata, and Linda Raines.

4. Plaintiff, H. Paul Lillebo, is a civil service employee of the State of California who was formerly

placed in Bargaining Unit No. 10, but has since been promoted to a supervisorial position no longer represented by CSEA. Plaintiff Lillebo seeks to compel CSEA to return money that was deducted from his wages during the time he was in Bargaining Unit No. 10. Lillebo's monthly paycheck is not being currently reduced, but at all times during the period in which "fair share" fees were withheld from his wages, he desired to represent himself in any employment relations with the State of California. Further, plaintiff has opposed at all times any portion of these "fair share" fees being used for any political purposes which included but was not limited to lobbying activity. Pursuant to the "tax" authorized by Chapter 1572, Cory had reduced this plaintiff's wages and delivered these moneys to CSEA. This plaintiff does not belong to CSEA nor does he wish to belong to, associate with, or be represented by CSEA. This plaintiff seeks to compel CSEA to return money that was deducted from his wages for "fair share" fees.

5. Plaintiff, Del Rasmussen, is a civil service employee of the State of California who is in Bargaining Unit No. 10 which is no longer represented by CSEA. Plaintiff Rasmussen seeks to compel CSEA to return money that was deducted from his wages during the time Bargaining Unit No. 10 was represented by CSEA. Plaintiff Rasmussen's monthly paycheck is no longer being reduced by CSEA, but at all times during the period in which "fair share" fees were withheld from his wages, he desired to represent himself in any employment relations with the State of California. Further, plaintiff has opposed at all times any portion of these "fair share" fees being used for any political purposes which included, but was

not limited to, lobbying activities. Pursuant to the "tax" authorized by Chapter 1572, Cory had reduced this plaintiff's wages and delivered these moneys to CSEA. This plaintiff does not belong to CSEA nor does he wish to belong to, associate with, or be represented by CSEA. This plaintiff seeks to compel CSEA to return money that was deducted from his wages for "fair share" fees.

6. Plaintiffs, Harry Baertschi, Debi S. Banks, Magda Beutel, Geraldine C. Buehler, Lynn Champomier, David G. Cowan, Christine A. Cummings, Sonja A. Delagado, Gerald D. Gordon, Harley L. Hansen, Jr., Thomas Hughes, Marilyn Kehlet, David L. Kupper, Hugh C. Lowe, Nancy G. Lum, Frederick C. Ruge, Kathleen A. Santos, Keith L. Spear, James D. Strutton, F. C. Sutliff, Harry T. Van Fossen, Rhane Vennes, Dennis B. Ward, J. William Weaver, Dion E. Webb, John M. Woodbury, and Keith C. Work, are civil service employees of the State of California who have been placed in Bargaining Unit No. 1. Up until December 22, 1984, when "fair share" fees were voted out, the so-called "exclusive" representative for Bargaining Unit No. 1 was CSEA. These plaintiffs' monthly paychecks are not now being currently reduced, but at all times during the period in which "fair share" fees were withheld from their wages, they each desired to represent themselves in any employment relations with the State of California. Further, each of these plaintiffs has opposed at all times any portion of these "fair share" fees being used for any political purposes which included but was not limited to lobbying activity. Pursuant to the "tax" authorized by Chapter 1572, Cory reduced these plaintiffs' wages and delivered these moneys to CSEA. These plaintiffs do not belong to CSEA nor did they wish to belong

to, associate with, or be represented by CSEA. These plaintiffs seek to compel CSEA to return money that was deducted from their wages for "fair share" fees.

7. Plaintiff, Dannie Bregman, is a civil service employee of the State of California who was formerly placed in Bargaining Unit No. 4. Her current position is not now being represented by CSEA. Plaintiff Bregman seeks to compel CSEA to return money that was deducted from her wages during the time she was in Bargaining Unit No. 4. Since July, 1984, plaintiff Bregman's monthly paycheck has not been reduced, but at all times during the period in which "fair share" fees were withheld from her wages, she desired to represent herself in any employment relations with the State of California. Further plaintiff Bregman has opposed at all times any portion of these "fair share" fees being used for any political purposes which included but was not limited to lobbying activity. Pursuant to the "tax" authorized by Chapter 1572, Cory has reduced this plaintiff's wages and delivered these moneys to CSEA. This plaintiff does not belong to CSEA nor does she wish to belong to, associate with, or be represented by CSEA. Plaintiff Bregman seeks to compel CSEA to return money that was deducted from her wages for "fair share" fees.

8. Plaintiffs, Sally D. Brown and Clement L. Mansion, Jr., are civil service employees of the State of California who were formerly placed in Bargaining Unit No. 4, but have since been promoted to positions no longer represented by CSEA. Plaintiffs Brown and Mansion seek to compel CSEA to return money that was deducted from their wages during the time they were in

Bargaining Unit No. 4. These plaintiffs' monthly paychecks are not being currently reduced, but at times during the period in which "fair share" fees were withheld from their wages, they each desired to represent themselves in any employment relations with the State of California. Further, each of these plaintiffs has opposed at all times any portion of these "fair share" fees being used for any political purposes which included but was not limited to lobbying activity. Pursuant to the "tax" authorized by Chapter 1572, Cory had reduced these plaintiffs' wages and delivered these moneys to CSEA. These plaintiffs do not belong to CSEA nor do they wish to belong to, associate with, or be represented by CSEA. These plaintiffs seek to compel CSEA to return money that was deducted from their wages for "fair share" fees.

9. Plaintiffs, Barbara J. Babich, Grace Barrell, Joan Brandli, Mary Ann Comaduran, Laurel Dailey, Greta Dumaguindin, Mary Hart, Debra Heninger, Frances M. Jones, Connie Mathews, Doris Valdry, and Janet I. Webb, are civil service employees of the State of California who have been placed in Bargaining Unit No. 4. The so-called "exclusive" representative for these bargaining units is CSEA. These plaintiffs' wages are currently being reduced in amounts ranging from $3.72 to $14.80 each month as "fair share" fees. Pursuant to the "tax" authorized by Chapter 1572, Cory has been reducing these plaintiffs' wages and delivered these moneys to CSEA. These plaintiffs do not belong to CSEA nor do they wish to belong to, associate with, or be represented by CSEA. These plaintiffs have always desired to represent themselves in their employment relations with the State of California. Further, each of these plaintiffs has opposed at

all times any portion of those "fair share" fees being used for political purposes which include, but is not limited to, lobbying activities. These plaintiffs seek to compel CSEA to return money that was deducted from their wages for "fair share" fees.

10. Plaintiffs, Jeanne E. Bickford, Melody Bowden, Pamela Broyles, Kathy Casado, Corine H. Creel, Cathleen M. Flohr, Alan L. Giorgi, Lynne Goutermont, James J. Hanocek, Dennis A. Herbert, Robert F. Hunt, Susanna Yeung Kong, Tito Kumar, Georgia Lipphardt, William J. Lynn, Kathy Moore, Anthony G. Munso, Kaylyn Nafus Warren, Bill Nakata, Marianne Nixon, Madeleine L. Owyang, Peter Panos, Linda Rains, Linda L. Case Rainey, Daniel D. Stedman, Paula B. Steiman, and Elli Wong, are civil service employees of the State of California who have been placed in Bargaining Unit No. 1. Up until December 22, 1984, when "fair share" fees were voted out, the so-called "exclusive" representative for Bargaining Unit No. 1 was CSEA. These plaintiffs' monthly paychecks are not now being currently reduced, but at all times during the period in which "fair share" fees were withheld from their wages, they each opposed at all times any portion of those "fees" being used for any political purposes which included but was not limited to lobbying activity. Pursuant to the "tax" authorized by Chapter 1572, Cory had until December 22, 1984, to reduce plaintiffs' wages for "fair share" fees and deliver these moneys to CSEA. These plaintiffs did not belong to CSEA nor do they wish to belong to, associate with, or be represented by CSEA. These plaintiffs seek to compel CSEA to return money that was deducted from their wages for "fair share" fees.

11. Plaintiffs, James Q. Coe and Robert L. Riffle, are civil service employees of the State of California who were formerly placed in Bargaining No. 1, but have since been promoted to a supervisorial position and are no longer represented by CSEA. Plaintiffs Coe and Riffle seek to compel CSEA to return money that was deducted from their wages during the time they were in Bargaining Unit No. 1. These plaintiffs' monthly paychecks are not now being currently reduced, but at all times during the period in which "fair share" fees were withheld from their wages, they each opposed at all times any portion of those "fees" being used for any political purposes which included but was not limited to lobbying activity. Pursuant to the "tax" authorized by Chapter 1572, Cory had reduced these plaintiffs' wages and delivered these moneys to CSEA. These plaintiffs did not belong to CSEA nor do they wish to belong to, associate with, or be represented by CSEA. These plaintiffs seek to compel CSEA to return money that was deducted from their wages for "fair share" fees.

12. Plaintiffs, Fred La Caro and Philip L. Zentner, are civil service employees of the State of California who are in Bargaining Unit No. 10 which is no longer represented by CSEA. Plaintiffs La Caro and Zentner seek to compel CSEA to return money that was deducted from their wages during the time Bargaining Unit No. 10 was represented by CSEA. These plaintiffs' monthly paychecks are no longer being reduced by CSEA, but at all times during the period in which "fair share" fees were withheld from their wages, they each opposed at all times any portion of those "fees" being used for any political purposes which included but was not limited to lobbying

activity. Pursuant to the "tax" authorized by Chapter 1572, Cory had reduced these plaintiffs' wages and delivered these moneys to CSEA. These plaintiffs did not belong to CSEA nor did they wish to belong to, associate with, or be represented by CSEA. These plaintiffs seek to compel CSEA to return money that was deducted from their wages for "fair share" fees.

13. Plaintiff, Eugene M. De Leon, is a civil service employee of the State of California and was formerly placed in Bargaining Unit No. 4, but since February 28, 1984, has been in a supervisorial position not represented by CSEA. Plaintiff De Leon seeks to compel CSEA to return money that was deducted from his wages during the time he was in Bargaining Unit No. 4. This plaintiff's monthly paycheck is not now being currently reduced, but at all times during the period in which "fair share" fees were withheld from his wages, he opposed at all times any portion of those "fees" being used for any political purposes which included but was not limited to lobbying activity. Pursuant to the "tax" authorized by Chapter 1572, Cory had reduced this plaintiff's wages and delivered these moneys to CSEA. This plaintiff did not belong to CSEA nor does he wish to belong to, associate with, or be represented by CSEA. This plaintiff seeks to compel CSEA to return money that was deducted from his wages for "fair share" fees.

14. Plaintiffs, Helen Begovich, Shirley Cortell, Sue A. Eagen, Katherine S. Felion, Esther M. Franco, Karol Hildebrand, Jacquelyn F. Kelley, Helen Laux, Elvera Maldonado, Marilyn Marchetti, Shirley J. Martucci, Isaias R. Mallari, Sandra P. Ortega, Lucia G. Quesada, Mary Shiro, Mary L. Vanacore, and Hazel Wambolt, are civil service

employees of the State of California who have been placed in Bargaining Unit No. 4. The so-called "exclusive" representatives for these bargaining units is CSEA. These plaintiffs' wages are currently being reduced in amounts ranging from $2.50 to $14.13 each month as "fair share" fees. Pursuant to the "tax" authorized by Chapter 1572, Cory has been reducing these plaintiffs' wages and delivered these moneys to CSEA. These plaintiffs have always opposed any portion of these "fair share" fees being used for any political purposes which includes, but is not limited to, lobbying activities. These plaintiffs do not belong to CSEA nor do they wish to belong to, associate with, or be represented by CSEA. These plaintiffs seek to compel CSEA to return money that was deducted from their wages for "fair share" fees.

15. Plaintiffs, Fredick P. DeRose, William K. Lee, Martha Miller, Janice Peterson Buhler, and Steven R. Sanabria, are former civil service employees of the State of California. Plaintiffs' state employment ended on the following dates: DeRose, August, 1983; Lee, March 30, 1984; Miller, November, 1984; Buhler, September 25, 1984; and Sanabria, December, 1983. While state employees a portion of their wages was withheld for "fair share" fees to be used by CSEA, the so-called "exclusive representative for their bargaining units. Pursuant to the "tax" authorized by Chapter 1572, Cory had reduced these plaintiffs' wages and delivered these moneys to CSEA. During the period of reduction, these plaintiffs were opposed to any portion of the fees withheld from their wages being used for political purposes of any type which included, but was not limited to, lobbying activities. These plaintiffs did not belong to CSEA. These plaintiffs seek to compel

CSEA to return money that was deducted from their wages for "fair share" fees.

16. Plaintiff, Leslie R. Alter Billington, is a civil service employee of the State of California who has been placed in bargaining Unit No. 11. The so-called "exclusive representative for this bargaining unit is CSEA. This plaintiff's wages are currently being reduced in the amount of $18.72 each month as "fair share" fees. Pursuant to the "tax" authorized by Chapter 1572, Cory has been reducing this plaintiff's wages and delivered this money to CSEA. This plaintiff does not belong to CSEA nor does she wish to belong to, associate with, or be represented by CSEA. Plaintiff, Billington, has always opposed any portion of these "fair share" fees being used for any political purposes which includes, but is not limited to, lobbying activities. This plaintiff seeks to compel CSEA to return money that is being deducted from her wages for "fair share" fees.

17. Defendant, Kenneth Cory, is the Controller of the State of California and is charged with the duty of drawing warrants to pay the wages due state employees. Pursuant to the provisions of Chapter 1572, Cory has reduced the wages of the above-named plaintiffs without their consent and has paid that portion of plaintiffs' wages to CSEA.

18. Defendant, CSEA, is or has been a "recognized employee association" within the meaning of Government Code § 3513(b) for Bargaining Unit Nos. 1, 4, 10, and 11. Pursuant to the provisions of Chapter 1572 and contract, CSEA receives or has received from Cory moneys deducted from plaintiffs' wages.

FIRST CAUSE OF ACTION

19. CSEA has in the past and, on information and belief, will continue in the future to expend substantial sums of money to influence legislation before the California State Legislature. On information and belief, plaintiffs allege that CSEA has used and will continue to use portions of the moneys withheld from plaintiffs' wages to carry on such lobbying activities.

20. Government Code § 3515.8 provides that plaintiffs may receive a rebate from CSEA of their pro rata share of CSEA's expenditures for *partisan* political or ideological activities. That section goes on to note, however

> "the pro rata share subject to refund shall not reflect, however, the costs of support of lobbying activities designed to foster policy goals and collective negotiations and contract administration, or to secure for the employees represented advantages in wages, hours, and other conditions of employment in addition to those secured through meeting and conferring with the state employer."

21. Plaintiffs listed in Paragraph Nos. 4 through 16, inclusive, the names of which are incorporated herein by reference, have always opposed the use of any portion of the fees withheld from their wages for political purposes of any type which includes, but is not limited to, lobbying activities. Plaintiffs are still or were required by contract and law to pay a monthly "fair share" fee to CSEA.

22. This statute and the actions taken pursuant to its provisions constitute a violation of plaintiffs' rights to freedom of speech and association guaranteed by

42 U.S.C. § 1983 and the First and Fourteenth Amendments to the United States Constitutions. In *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), the United States Supreme Court recognized that compelled financial support of an employee association infringed on dissenting employee's First and Fourteenth Amendment rights to freedom of speech and association. *Id.* at 222. Such infringement, the Court held, is only justified to the extent the compelled contributions are used for purposes of collective bargaining, contract administration, and grievance adjustment. *Id.* at 225-26. This statute, however, expressly authorizes the employee association to use compelled moneys for political and ideological purposes outside of the bargaining process and, as such, is an unconstitutional intrusion on plaintiffs' rights under 42 U.S.C. § 1983 and the First and Fourteenth Amendments to the United States Constitution to freedom of speech and association.

SECOND CAUSE OF ACTION

23. Government Code §§ 3512, 3513(j), 3515, and 3515.7 permit the employee association to charge a "fair share" fee to all employees in a bargaining unit who refuse to join that association. The stated purpose of that fee is to permit the recognized employee association to receive financial support from nonmember employees who benefit from the association's representation as the "exclusive" representative for that bargaining unit. Gov't Code § 3512.

24. Under the state bargaining law, the term "exclusive representative" is used to mean exclusive only in the

sense that it is the only "association" that can represent the employees in a particular unit. The state law does, however, reserve to the individual employees the right to represent themselves individually in their employment relations with the state. Gov't Code § 3515 and § 3515.5.

25. Plaintiffs listed in Paragraph Nos. 4 through 9, inclusive, the names of which are incorporated herein by reference, have always desired to represent themselves individually in their employment relations with the state employer as is their right under Government Code § 3515 and § 3515.5. Plaintiffs are still or were required by contract and law to pay a monthly "fair share" fee to CSEA.

26. Compelled payment of a "fair share" or agency shop fee has an impact on plaintiffs' rights of free speech and association guaranteed by 42 U.S.C. § 1983 and the First and Fourteenth Amendments to the United States Constitution. *Abood*, 431 U.S. at 222. Such an infringement on constitutionally guaranteed civil liberties is justified only when the employees compelled to pay such fees are *in fact* represented by the employee association and the association's use of those fees is further limited to collective bargaining, contract administration, and grievance adjustment. *See id.* at 221-22, 225-26. Absent this "in fact" representation and limited use of compelled fees, the proffered compelling or important governmental interest of labor peace and stability is not advanced and there is no constitutional justification for the infringement of rights cause by compelled payment of the fee.

27. Plaintiffs are not in fact represented by CSEA in their employment relations with the state and there is no

constitutional justification for the infringement of plaintiffs' First and Fourteenth Amendment rights caused by the compelled payment of the so-called "fair share" fee. Government Code §§ 3512, 3513(j), 3515, and 3515.7 which authorize the compulsion of plaintiffs to pay the so-called "fair share" fee are thus unconstitutional and violative of 42 U.S.C. § 1983.

THIRD CAUSE OF ACTION

28. Section 3515.8 of the Government Code provides a rebate mechanism for the agency shop fees paid by dissenting employees. This section provides for a return of additional pro rata share of expenditures by the recognized employee organization that is in aid of activities or causes of a partisan political or ideological nature only incidentally related to the terms and conditions of employment.

29. Plaintiffs listed in Paragraph Nos. 4 through 16, the names of which are incorporated herein by reference, have always opposed any portion of the so-called "fair share" fees withheld from their wages being used for political purposes of any type, which includes, but is not limited to, lobbying activities. Plaintiffs are still or were required by contract or law to pay a monthly "fair share" fee to CSEA. These plaintiffs were not given an adequate explanation for the basis of the fee to gauge the propriety of CSEA's calculations before deductions were made or given a reasonably prompt opportunity to challenge the amount before an impartial decision maker. Additionally, once a rebate is requested, there is no requirement to

establish an escrow for the amount reasonably in dispute while the challenge is pending.

30. These plaintiffs are forced or have been forced to subsidize CSEA's political and ideological activities through "fair share" fee deductions.

31. The pure rebate procedure used by CSEA and mandated by Section 3515.8 is not carefully tailored to safeguard these plaintiffs' First Amendment rights to prevent compulsory subsidization of ideological activities and is therefore unconstitutional on its face.

FOURTH CAUSE OF ACTION

32. Defendant Cory has, since the first pay period of January, 1983, withheld moneys from plaintiffs' wages and has delivered that portion of plaintiffs' wages to CSEA as plaintiffs' compelled "fair share" fee.

33. The withdrawal of these fees from plaintiffs' wages constitutes an infringement of plaintiffs' First and Fourteenth Amendment rights to freedom of speech and association. Defendant CSEA has no legal or constitutional right to retain those fees. The continued retention of those fees by CSEA constitutes a continuing violation of plaintiffs' constitutionally guaranteed civil liberties.

WHEREFORE, plaintiffs pray for relief as follows:

1. a declaration issue that the provisions of Government Code § 3515.8 permitting private associations to use plaintiffs' compelled "fair share" fees for purposes other than collective bargaining, contract administration, and grievance adjustment is unconstitutional on its face and

that such unconstitutionality pervades the entire statutory scheme for assessment of "fair share" fees;

2. a declaration issue that Government Code § 3515.8 does not meet the constitutional requirements of a rebate procedure and is unconstitutional on its face;

3. a declaration issue that Government Code §§ 3512, 3513(j), 3515, and 3515.7 violate 42 U.S.C. § 1983 and/or are unconstitutional;

4. an injunction issue prohibiting defendant Cory from enforcing Government Code §§ 3512, 3513(j), 3515, and 3515.7 through reduction of plaintiffs' wages for payment of a "fair share" fee;

5. an injunction issue prohibiting CSEA from expending any amount of plaintiffs' compelled fair share fees for purposes other than collective bargaining, contract administration, and grievance adjustment;

6. that defendant CSEA be ordered to return to plaintiffs all sums unconstitutionally withheld from plaintiffs' wages;

7. that plaintiffs be awarded their costs of suit, including reasonable attorneys' fees; and

8. that the Court grant such other and further relief as it shall deem proper.

DATED: November 10, 1986.

Respectfully submitted,

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VERIFICATION

I, H. Paul Lillebo, declare as follows:

I am one of the plaintiffs in this action. I have read the foregoing Second Amended Complaint for Declaratory and Injunctive Relief and Money Damages and, except for the matters stated on information and belief, the facts therein are true of my own knowledge, and as to those matters stated on information and belief, I believe them to be true.

I declare under penalty of perjury that the foregoing is true and correct and that this verification was executed this 7th day of November, 1986, at Sacramento, California.

/s/ H. Paul Lillebo
H. PAUL LILLEBO

(2)

No. 90-1201

Supreme Court, U.S.
FILED
FEB 27 1991
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1990

H. PAUL LILLEBO, et al.,

Petitioners,

v.

GRAY DAVIS, in his capacity as the Controller of the State of California, and CALIFORNIA STATE EMPLOYEES' ASSOCIATION,

Respondents.

Petition For Writ Of Certiorari To The Court Of Appeal Of California, Third Appellate District

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether, as construed by the California courts, the provisions of California Government Code section 3515.8 for the expenditure of fair share fees, on their face, violate the First Amendment right of freedom of association of objecting nonmember employees.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent Gray Davis, Controller of the State of California, hereby submits opposition to the petition for a writ of certiorari, which seeks review of the decision of the Court of Appeal of the State of California for the Third Appellate District in this case.

STATEMENT OF THE CASE

A. Summary of Material Facts

The Dills Act, California Government Code[1] section 3512 et seq., provides the framework for collective bargaining and employee-employer relations for state employees in California. The Act divides employees into bargaining units represented by exclusive employee organizations or unions.

To defray union costs for representing employees who are not union members, in 1982, effective January 1, 1983, the California Legislature amended section 3515.7, subdivision a, to provide that "[o]nce an employee organization is recognized as the exclusive representative of an appropriate unit, it may enter into an agreement with the state employer providing for organizational security

[1] Unless otherwise indicated, all section references are to the California Government code.

in the form of maintenance of membership or fair share fee[2] deduction."

Respondent Gray Davis, State Controller of California, on behalf of the State as employer, is authorized to deduct the fair share fees from the salary or wages of state employees who are not members of the union (§ 3515.7 (b)).

To assist employees in this process, the Dills Act requires employee organizations to keep "an adequate itemized record of [their] financial transactions" and to make available to the California Public Employment Relations Board (hereinafter "PERB") and to employees a "a detailed written financial report" annually (§ 3515.7 (e)).

Non-member employees have the right to demand and receive from unions a return of any part of their fair share fees which is spent "either in aid of activities or causes of a partisan political or ideological nature only incidentally related to the terms and conditions of employment, or applied towards the cost of any other benefits available only to members of the recognized employee organization" (§ 3515.8).

---

[2] For purposes of the Dills Act," . . . 'Fair share fee' means the fee deducted by the state employer from the salary or wages of a state employee in an appropriate unit who does not become a member of and financially support the recognized employee organization. The fair share fee shall be used to defray the costs incurred by the recognized employee organization in fulfilling its duty to represent the employees in their employment relations with the state, and shall not exceed the standard initiation fee, membership dues, and general assessments of the recognized employee organization." Section 3513(k).

Section 3518.8 further provides that the refund shall not reflect or include:

> " . . . the costs of support of lobbying activities designed to foster policy goals and collective negotiations and contract administration, or to secure for the employees represented advantages in wages, hours, and other conditions of employment in addition to those secured through meeting and conferring with the state employer. The [PERB] may compel the recognized employee organization to return that portion of a fair share fee which the board may determine to be subject to refund under the provisions of this section."

The petitioners in this action are state employees and fair share fee payers who allege that the fair share provisions of the Dills Act unconstitutionally impinge on their First Amendment right of freedom of association. Respondent CSEA is a recognized employee organization receiving fair share fees.

B. Summary of Procedural History

On May 2, 1983, plaintiffs filed a complaint for declaratory and injunctive relief and damages against the California State Employees Association (hereinafter "CSEA") and the State Controller. On December 11, 1986, with leave of the court, the plaintiffs filed a second amended complaint. Defendants then answered the second amended complaint. Between January 6, 1988, and February 1, 1988, the parties filed cross-motions for summary judgment. On May 31, 1988, the superior court filed an order granting CSEA's motions and denying those of

plaintiffs. On July 6, 1988, defendant CSEA moved for reconsideration of a portion of the court's order.

On June 21, 1988, in response to CSEA's motion for reconsideration, the trial court filed its final order on the cross-motions for summary judgment or summary adjudication.

On October 28, 1988, plaintiffs filed a partial dismissal of the "as applied" issues referenced in paragraphs 4 and 5 of the June 21, 1988 order of the court and of the third cause of action of the second amended complaint.

On December 15, 1988, judgment was entered in favor of defendants consistent with the partial dismissal of plaintiffs and the court's June 21, 1988 order.

Petitioners appealed to the California Court of Appeal for the Third Appellate District which affirmed the judgment of the trial court on March 23, 1990. The petitioners then sought a rehearing which was denied on April 17, 1990. Thereafter petitioners filed a petition for review which was granted by the California Supreme Court on June 29, 1990. That court then transferred the matter back to the Court of Appeal with directions to vacate its decision and reconsider the matter in light of *Keller v. State Bar of California*, 495 U.S. ___, 110 L. Ed. 2d 1 (1990). The Court of Appeal "reissued" its opinion on August 20, 1990, finding the statutes at issue were not facially unconstitutional.

On September 27, 1990, petitioners sought review in the California Supreme Court. Review was denied on October 30, 1990.

REASONS WHY THE WRIT SHOULD BE DENIED

I

AS INTERPRETED BY THE CALIFORNIA COURT OF APPEAL, THE FAIR SHARE FEE PROVISIONS OF THE DILLS ACT ARE FACIALLY CONSTITUTIONAL

Petitioners are requesting this court to review state court proceedings where they chose to limit their challenge to the fair share fee provisions of the Dills Act to the constitutionality of the provisions "on their face". However, in their petition they fail to acknowledge that their appeal in the state courts was limited to the facial validity of the Dills Act, and instead they argue that the decision of the California Court of Appeal allows the use of agency shop fees for matters not germane to collective bargaining, and they raise the specter of the corrosive impact public employee unions will have on the political process with their treasuries loaded with agency shop fees which will be used for ideological lobbying. In making these arguments, petitioners fail to acknowledge that, in considering a challenge to the facial validity of the Dills Act, the lower court was under an obligation to construe the statute, if at all possible, in a manner favoring its constitutionality, and was foreclosed from considering the actual application of the statute.

When the facial constitutionality of a statute is challenged, the courts first ascertain whether the statute can be reasonably construed to avoid the constitutional difficulty. *Ellis v. Brotherhood of Railway, Airline, and Steamship Clerks, etc.*, 466 U.S. 435, at 444 (1984).

> "It is well established that the courts will not invalidate a statute on its face simply because it **may** be applied unconstitutionally, but only if it

> cannot be applied consistently with the Constitution. Thus in *Members of the City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 104 S.Ct. 2118, 80 L.Ed.2d 722 (1984), the Supreme Court explained there are two different contexts in which a statute may be declared facially invalid: 'either because it is unconstitutional in every conceivable application, or because it seeks to prohibit such a broad range of protected conduct that it is unconstitutionally "overbroad"' (*Id.* at 796, 104 S.Ct. at 2124. A holding that invalidates a statute in the first situation 'expresses the conclusion that the statute could never be applied in a valid manner' *Id.* at 797-98, 104 S.Ct. at 2125 . . . " *Robinson v. State of New Jersey* (II) 806 F.2d 442, at 446-47 (3rd Cir. 1986).[3]

Petitioners' chief complaint is with the provisions of section 3515.8 of the Dills Act which allow fair share fees to be used for limited lobbying activities. As construed by the Court of Appeal these provisions allow for the use of fair share fees to defray:

> " . . . the costs of support of lobbying activities designed to foster policy goals [in][4]

---

[3] In freedom of speech or association cases, the doctrine of facial unconstitutionality due to overbreadth "is predicated on a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain constitutionally protected speech or expression (citations and interior quotation marks omitted)" *Robinson v. State of N.J.*, supra, 806 F.2d at 447. Because the provisions of the Dills Act at issue before the court threaten no sanctions, there is no question of their having a chilling effect on expressive activity and the doctrine of overbreadth is not applicable to this case (*Id.* at 447).

[4] Brackets indicate changes made by Court of Appeal in construing section 3515.8.

> collective negotiations and contract administration, or to secure for employees represented advantages in wages, hours, and other conditions of employment in addition to those secured through meeting and conferring with the state employer . . . " (App. A-31-32).[5]

Petitioners contend that, as construed by the Court of Appeal, section 3515.8 violates their First Amendment rights of freedom of association by compelling them to support lobbying activities that are not "germane to the collective bargaining process". Petitioners err in their reading of this Court's decisions on the subject and in their reading of the decision of the Court of Appeal.

Petitioners' contention relies heavily on tests espoused in *Ellis v. Brotherhood of Railway, Airline, and Steamship Clerks, etc.*, 466 U.S. 435 (1984) and *Comm. Wks. of Am. etc. v. Beck*, 487 U.S. 735 (1988), 101 L.Ed.2d 634. However, those cases involve collective bargaining in the private sector. In the public employment sector, the line between permissible and impermissible expenditures is "somewhat hazier" than in the private employment sector. *Champion v. State of California, supra*, 738 F.2d 1082, 1085 (9th Cir. 1984), cert. den. sub nom. *Champion v. Deukmejian*, 469 U.S. 1229 (1985). This is because whether certain fair share fee expenditures are proper depends on the nature of the bargaining process. *Abood v. Detroit Bd. of Education*, 431 U.S. 209, 236, n. 33 (1977); *Champion v. State of California, supra*, 738 F.2d at 1086.

The courts recognize "[d]ecision making by a public employer is above all a political process [citation omitted] and . . . related budgetary and appropriations decisions

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[5] App. A refers to Appendix A of the Peition for Writ of Certiorari in this case.

might be seen as an integral part of the bargaining process . . . The very nature of the free-rider problem and the governmental interest in overcoming it require that the union have a certain flexibility in its use of compelled funds." *Ellis, supra,* 466 U.S. at 456.

In *Champion,* the Ninth Circuit upheld the *prima facia* validity of section 3515.8 and noted that more legislative matters are involved in state employee-employer relations than merely the approval and funding of the memorandum of understanding.

> "Because public employees work for the state, matters which are ordinarily left to direct negotiation in the private sector are covered by statute. For example, grievance adjustment, California Government Code section 18714; computation of leave when there is a break in service, *Id.* section 19143; the policy of paying female workers on the principle of comparable worth to remedy great discrepancies between male and female workers' salaries, *Id.* section 19827.2(a); the notice and hearing procedure when an employee's salary is changed, *Id.* section 19828; and the use of hourly or day workers, *Id.* section 19830, are provided by statute, but may be changed through negotiation. See generally *Id.* section 3517.6 for a list of statutes affecting public employees. These statutes create a status quo from which the bargaining representatives start negotiations for their particular units. The importance of legislation affecting public employment, enacted in a forum apart from the meet-and-confer sessions authorized by statute, California Government Code section 3517, requires that public employee representatives be given broad authority to protect their members' interests before the legislature."

(*Champion v. State of California, supra,* 738 F.2d at 1086.)

The *Champion* case reveals that, in the public sector, especially at the state level, many of the matters that are resolved through collective bargaining in the private sector are governed by statute and can not be resolved through collective bargaining. Thus petitioners' blithe assertion that the Court of Appeal decision allows the use of the fees of objecting employees to be used "outside the collective bargaining process" (See Pet. p. 12-13), is a distortion of the situation public employee unions face when they wish to improve working conditions and benefits for their members.

Although petitioners contend that the Court of Appeal's construction of the Dills Act is contrary to this court's ruling in *Abood v. Detroit Board of Education,* 431 U.S. 209 (1977), they fail to heed this court's counsel in *Abood* to avoid the unnecessary and abstract decision of constitutional questions. In *Abood,* this court declined to make unnecessary distinctions of permissible and impermissible union expenditures of fair share funds, in part because the case came before the court after judgment on the pleadings without a factual record.

This court reasoned that, with no evidentiary record, it is difficult, in the abstract, to determine what specific union activities "properly fall under the definition of collective bargaining. The lack of factual concreteness and adversary presentation to aid us in approaching the difficult line-drawing questions highlights the importance of avoiding unnecessary decision of constitutional questions." (*Id.* at 236-237, footnote omitted). Since this case comes before this court in the same posture as *Abood,*

for the same reasons this court should deny the writ to avoid the unnecessary decision of important constitutional questions.

Petitioners also cite *Keller v. State Bar of California*, 495 U.S.___, 110 L.Ed. 2d 1 (1990) as support for their case. However, the Court of Appeal correctly construed *Keller*, finding that:

> *Keller* does not purport to alter the general guidelines for permissible use of compelled contributions. Consequently, it cannot be read to suggest, as plaintiffs would have it, that lobbying reasonably related to the advancement of the union's representation role may not be charged to the objecting nonmembers or that all lobbying must be confined to seeking approval of the memorandum of understanding or related budgetary items. (App. A-39).

Petitioners also err in their second argument where they allege the Court of Appeal failed to follow the guidance of this court in *Ellis* and rendered a decision that fails to survive the level of scrutiny required by the First Amendment.

Their error is that the Court of Appeal decision discussed *Ellis* at length (App. A-23-25, 39-40, 49-50) and correctly applied the *Ellis* test for permissible expenditures for matters "germane to collective bargaining process". What petitioners fail to appreciate is that the Court of Appeal realized that the *Ellis* test for allowable costs envisions not just the costs of the actual bargaining process and costs for approval of the terms of the memorandum of understanding, but also, "whether the challenged expenditures are necessary or reasonably incurred for the

purpose of performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues." (*Ellis v. Brotherhood, supra,* 466 U.S. at 448, quoted at App. A-24.)

II

THE WRIT SHOULD BE DENIED BECAUSE THERE IS NO CONFUSION IN THE LOWER FEDERAL COURTS REGARDING THE PERMISSIBLE USE OF FAIR SHARE FEES THAT WOULD BE RESOLVED BY THIS CASE

In their third argument, petitioners contend certiorari should be granted to resolve divergent approaches among the federal Courts of Appeals on where the line should be drawn for the permissible use of fair share fees. The petitioners cite only two cases for this argument, both of which fail to support their contention.

The first case they cite is the Sixth Circuit case of *Tierney v. City of Toledo,* 824 F.2d 1497 (6th Cir. 1987). They cite dicta from *Tierney* to the effect that "the exclusive representative may collect only for expenses exclusively related to the bargaining agreement." *Ibid.* at 1505. However, this language was for the benefit of an arbitrator who was to determine what expenses were actually allowable in a particular two year contract (*Ibid.* at 1504-1505). The *Tierney* court's decision does not represent a divergent approach to the problem because the court did not consider the extent to which fair share fees may be used for lobbying related to conditions of employment. It is axiomatic that cases are not authority for matters that were not considered by the court.

The only other case which petitioners cite for a divergent approach is *Hudson v. Teachers' Union Local No.1*, 743 F.2d 1187, 1193 (7th Cir. 1984), where the Seventh Circuit admonished that fair share fees should only be used to defray the costs of the union as the "exclusive bargaining representative". However, with a proper understanding of the role of the exclusive bargaining agent in the public sector, it is clear that there is no divergence of approaches between the Seventh Circuit and the California Court of Appeals' decision which restricts lobbying activities financed with fair share fees to "better terms and conditions for public employment or other **representation related policy goals**" (App. at A-11, emphasis added).

Tierney and *Hudson* are also distinguishable from this case because they involved employees of local government, police officers and teachers, and not employees of state government where the terms and conditions of employment are more likely to be fixed by statute.

The putative divergence of approaches thus disappears with a careful reading of *Tierney* and *Hudson* and an appreciation of the fact that the unions in those cases represented, respectively, police officers and teachers, and not employees of state government where many of the terms and conditions of employment are set by statute.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

DATED: February 27, 1991

Respectfully submitted,

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On Petition for Writ of Certiorari to the Court of Appeal of California, Third Appellate District

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MEMORANDUM IN OPPOSITION OF CALIFORNIA STATE EMPLOYEES ASSOCIATION

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**On Petition for Writ of Certiorari to the
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MEMORANDUM IN OPPOSITION OF CALIFORNIA STATE EMPLOYEES ASSOCIATION

STATEMENT

The State of California's Dills Act authorizes a union chosen by an appropriate collective bargaining unit of State employees as their exclusive representative to negotiate a labor contract providing "for organizational security in the form of . . . [a] fair share fee deduction" from the wages of represented employees. Pet. App. A-8-9, quoting Cal. Gov. Code § 3515.7(a). The California Act's purpose in this respect is to assure that all bargaining unit employees pay their share of "the costs incurred by the recognized employee organization in fulfilling its duty to represent the [unit] employees in their employment relations with the state, . . ." Pet. App. A-9, quoting Cal. Gov. Code § 3513(j).

The California Act provides that the fair share fee charged to an objecting nonmember of the union *may not* include "the employee's additional pro rata share of expenditures by the [union] that is either in aid of activities or causes of a partisan political or ideological nature only incidentally related to the terms and conditions of employment, or applied toward the cost of any other benefits available only to members of the [union]." Pet. App. A-9, quoting Cal. Gov. Code § 3515.8.

The California statute provides too that the fair share fee *may* include the objecting employee's pro rata share of "the costs of support of lobbying activities designed to foster policy goals [in] collective negotiations and contract administration, or to secure for the employees represented advantages in wages, hours, and other conditions of employment in addition to those secured through meeting and conferring with the state employers." Pet. App. A-9-10, quoting Cal. Gov. Code § 3515.8.[1] As authoritatively construed by the California court of appeal, the statutory permission to include lobbying expenditures in the fair share fee "is *limited to activities germane to collective negotiations, contract administration and employment benefits.*" Pet. App. A-11 (emphasis added).

The petitioners challenge this authorization to finance certain lobbying activities with fair share fees as *unconstitutional on its face.* Pet. App. A-10.[2] The courts below denied this challenge. As a matter of First Amendment law, the California court of appeal "conclude[d] that the union may properly use fair share fees for

---

[1] This provision of the code refers to "policy goals and collective bargaining," but the California court of appeal determined that this was a typographical error and that the statute was intended to be read "policy goals *in* collective bargaining." Pet. App. A-32.

[2] The court below noted that questions concerning the constitutionality of the statute's application were not before it, because the petitioners dismissed the as-applied aspect of their case. Pet. App. A-35 n.11.

lobbying on matters germane to its collective bargaining role." Pet. App. A-40. And, as a matter of state law, the California court found that the California statute authorizes nothing more in terms of the use of fair share fees for lobbying. Pet. App. A-31-34.

The petitioners' constitutional theory is that the California Act violates the First Amendment by authorizing the use of fair share fees over objection for representational activities beyond collective bargaining in the narrowest sense of that term. Pet. 16. Petitioners would have it that the State's interest in labor peace is served only by face-to-face negotiations between the union representing State employees and the State's Executive branch in its role as employer. Pet. 17. From this premise, petitioners draw the conclusion that the only union lobbying that can be financed with an objector's fee payments is that necessary to ratify the collective bargaining agreement resulting from negotiations between the union and the Executive branch. Pet. 17.

The California court of appeal rejected this abstract approach to discerning the Legislature's interest in hearing from the exclusive representatives of State employees on employment matters. Rather, the California court placed the limited authorization for the expenditure of fair share fees on employment-related lobbying within the context of the State labor relations system. Pet. App. A-36-37.

To begin with, the California court of appeal notes that there is nothing in "the Dills Act [to] preclude [an] employer role for the Legislature." Pet. App. A-36. Far from there being a strict dichotomy between the Executive and Legislative branches when it comes to setting terms of State employment, the California court found that "in the context of public employment negotiations, the employer/state often assumes a duality in its executive and legislative roles." *Id.* Consistent with the dual roles played by the Executive and Legislature in State

labor relations, the California Act protects not only the right to meet and confer with representatives of the State Executive but "the union's broader right to represent its members in employment relations with the *state* (see §§ 3512, 3515.5), including not only the executive branch but also the Legislature." Pet. App. A-37, quoting *Cumero v. Public Employment Relations Bd.*, 49 Cal. 3d 575, 597, 778 P.2d 174 (1989) (emphasis in original).

Against this background, the California court of appeal stated that it "cannot fathom how a union's lobbying the Legislature for improvement of the conditions of employment of the members of its bargaining unit—union and nonunion alike—could not be considered to be part of its role as representative. . . ." Pet. App. A-37.

ARGUMENT

1. The California court of appeal's conclusion that an adequate State interest supports the decision of the California Legislature to authorize the use of fair share fees for *lobbying that is directly related to employment matters*, faithfully follows this Court's precedents setting the limits on compulsory fee payments. Pet. App. A-17-31. Moreover, the petitioners are unable to cite a single lower court decision that conflicts with the ruling below on lobbying expenditures. *See* Pet. 20-23.

The court of appeal paid particular attention to this Court's most recent decision in point: *Keller v. State Bar of California*, —— U.S. ——, 110 S.Ct. 2228 (1990). Applying the teachings of that decision to the circumstances of California State labor relations, the court found that "*Keller* . . . cannot be read to suggest, as plaintiffs would have it, that lobbying reasonably related to the advancement of the union's representational role may not be charged to objecting nonmembers. . . ." Pet. App. A-39.

In *Keller*, this Court held that all attorneys may be required to provide financial support to "those State Bar

activities in which the officials and members of the Bar are acting essentially as professional advisors to those ultimately charged with the regulation of the legal profession. . . ." 110 S.Ct. at 2237. In particular, the Court indicated that an objector's bar dues may be used to finance the making of "recommendations as to admission to practice, the disciplining of lawyers, codes of conduct, and the like to . . . the *legislature*." *Id.* at 2235 (emphasis added). Thus, under *Keller* members of the legal profession may be required to pay their share of the lobbying costs incurred by the State Bar in advising the State on regulation of the profession.

The California court of appeal found that *Keller*'s rationale justified charging nonmembers for their share of the costs incurred by their exclusive representative in advising the State on the interests of State employees with respect to their terms and conditions of employment. In this regard, the court could not see "why a nonunion unit member benefitting from that representation should not be expected to contribute toward the cost of achieving it. This squarely implicates the essential state interest in eliminating the 'free rider' problem (in order to facilitate labor peace) which justifies what might otherwise infringe upon the nonmember's constitutional rights." Pet. App. A-38 (footnote omitted).

2. The petitioners attempt to tie this case to *Lehnert v. Ferris Faculty Ass'n*, Sup. Ct. No. 89-1217, which is currently pending before the Court. Pet. 20-22. That attempt fails.

Lehnert does *not* involve a *facial* challenge to a statutory authorization to use fair share fees for employment-related lobbying. Rather, *Lehnert* is concerned with *particular* lobbying expenditures found by a trial court to be authorized under a state statute. *See Lehnert v. Ferris Faculty Ass'n*, 881 F.2d 1388, 1390 (6th Cir. 1989) ("this appeal is limited to the claim that the district court erred in holding that the costs of certain dis-

puted union activities were constitutionally chargeable to the plaintiff faculty members").

"A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987).[3] The difficulty petitioners face here is especially great since, as the California court of appeal explained, in applying the lobbying authorization, the California courts will "adopt an interpretation that, consistent with the statutory language and purpose, eliminates doubts as to the provision's constitutionality." Pet. App. A-34. *See also id.* at A-35 n.11.

Petitioners attempt to make the required showing by maintaining that the California Act authorizes the use of fair share fees for lobbying beyond that necessary to secure ratification of a collective bargaining agreement, and that the First Amendment prohibits the use of fair share fees beyond this very narrow range. Pet. 16-18. The petitioners are correct that the California statute does allow *employment-related* lobbying beyond that necessary to ratify the results of face-to-face negotiations between a union and the State Executive. But, as the California court of appeal recognized, *Keller* makes clear that the First Amendment does *not* confine the use of fair share fees only to lobbying that is directly related to collective bargaining narrowly defined. Rather, where, as here, the division of responsibility within government places certain issues concerning one's livelihood within the Legislative domain, *Keller* allows the use of fair share

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[3] The statutory authorization to use fair share fees for employment-related lobbying is *not* subject to First Amendment overbreadth analysis. The authorization does not *prohibit* any conduct, much less "make unlawful a substantial amount of constitutionally protected conduct. . . ." *Houston v. Hill*, 482 U.S. 451, 459 (1987).

fees for communicating with the Legislature on those issues. *See* pp. 3-4, *supra*.[4]

CONCLUSION

The petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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[4] The *Keller* Court found "useful guidelines for determining permissible expenditures" in the Railway Labor Act test for determining whether objecting fee payers may be charged for a particular class of activity. 110 S.Ct. at 2236. As set out in *Ellis* v. *Railway Clerks*, 466 U.S. 435 (1984), the RLA test is whether the activity "*relat*[*es*] *to the work of the union in the realm of collective bargaining*." *Id.* at 456 (emphasis added). This statutory test—which is "well within the acceptable range" under the First Amendment—allows "the union . . . a certain flexibility in its use of compelled funds," *id.* at 456-457, that permits charging for activities related to effective representation. As the California court of appeal opinion demonstrates, Pet. App. A-35-39, certain employment-related lobbying is a necessary part of effective representation in that State's public sector labor relations system.

(4)

No. 90-1201

Supreme Court, U.S.
FILED
MAR 22 1991
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

H. PAUL LILLEBO, *et al.*,

Petitioners,

v.

GRAY DAVIS, in his capacity as the Controller of the State of California, and CALIFORNIA STATE EMPLOYEES' ASSOCIATION,

Respondents.

On Petition for a Writ of Certiorari to the Court of Appeal of California, Third Appellate District

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BRIEF FOR THE NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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H. PAUL LILLEBO, *et al.*,

Petitioners,

v.

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**On Petition for a Writ of Certiorari to the
Court of Appeal of California,
Third Appellate District**

BRIEF FOR THE NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTRODUCTION

Pursuant to Supreme Court Rule 37.2, the National Right to Work Legal Defense Foundation ("Foundation") submits this brief *amicus curiae* in support of petitioners. All parties have given written consent to its filing.

INTEREST OF THE *AMICUS CURIAE*

The Foundation is a non-profit, charitable organization formed to provide free legal assistance nationwide to individual employees who, as a consequence of their subjection to compulsory unionism, suffer violations of their right to work, freedoms of association, speech, petition and religion, right to procedural due process of law, and other fundamental liberties guaranteed by the constitutions and laws of the United States and the States. The Foundation has supported several major cases involving the issue presented by this case, *i.e.*, the right of employees to refrain from paying, in whole or in part, compulsory dues or fees which labor organizations use in legislative and judicial lobbying or other forms of political and ideological activism. Those cases include *Abood v. Detroit Board of Education*,[1] *Ellis v. Railway Clerks*,[2] *Teachers Local 1 v. Hudson*,[3] *Communications Workers v. Beck*,[4] and *Lehnert v. Ferris Faculty Association*,[5] the last of which is now awaiting decision by this Court.

The Foundation has a specific interest in this case, because its staff attorneys represent more than eight hundred nonunion public employees who are required to pay compulsory union fees under the statute at issue here and similar California statutes. The Foundation is generally concerned with the case, morever, because, unless reversed, the decision of the California Court of Appeal will seriously undermine the rights of nonunion employees recognized in *Abood*, *Ellis*, and *Beck*, and their

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[1] 431 U.S. 209 (1977).

[2] 466 U.S. 435 (1984).

[3] 475 U.S. 292 (1986).

[4] 487 U.S. 735 (1988).

[5] 881 F.2d 1388 (6th Cir. 1989) (2-1 decision), *cert. granted*, 110 S. Ct. 2616 (1990), *argued*, 59 U.S.L.W. 3361 (U.S. Nov. 5, 1990) (No. 89-1217).

precursor, *Machinists v. Street*,[6] not to subsidize the lobbying and other political and ideological activism of labor unions. The Foundation submits this brief to emphasize the serious threat to the political freedoms of all American workers posed by the Court of Appeal's decision.

SUMMARY OF THE ARGUMENT

This Court should grant the petition because the decision of the Court of Appeal licenses the union to function as petitioners' forced "representative," and to collect "fair share fees," for the purposes of legislative lobbying that is undeniably *not* part of the statutory process of collective bargaining in California. The Court of Appeal's attempt to rationalize this result on the basis of *Abood* fails, because *Abood* explicitly countenanced the exaction of "fair share fees" only for such lobbying as is "an integral part of the bargaining process."[7]

This Court should also grant the petition because the Court of Appeal's decision logically supports forcing public employees to subsidize a union's political activism, in addition to legislative lobbying that is not "an integral part of the bargaining process." Moreover, the reasoning of the decision would apply equally well to *any* special-interest group in American society. Thus, the Court of Appeal's decision squarely contradicts *Abood*, which discountenanced the collection of "fair share fees" for political activism as a matter of law.[8]

Finally, although this Court will decide the issue of forced lobbying in *Lehnert*, it should nevertheless grant the petition here and at the least summarily reverse, so as explicitly to disapprobate

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[6] 367 U.S. 740 (1961).

[7] 431 U.S. at 236.

[8] *Id.* at 235. *See infra* note 33.

the gross misreading of *Abood* the Court of Appeal used to rationalize the exaction of "fair share fees" for legislative lobbying.

ARGUMENT

I. A writ of certiorari should issue, because petitioners raise an important constitutional question which *Abood* does not directly answer.

A. This Court should issue a writ of certiorari in this case because petitioners present an issue that implicates far more than simply the definition of what supposedly "collective-bargaining" activities a union designated as the exclusive representative of nonunion public employees may require them to support financially as a condition of their employment, consistent with the First and Fourteenth Amendments to the Constitution of the United States. For here, as authoritatively construed by the California Court of Appeal,[9] the Dills Act[10] does not just require nonmembers to pay a "fair share fee" for unquestionably "collective-bargaining" activities, or even for "lobbying" that is arguably "an integral part of the bargaining process,"[11] but also compels such payments for "lobbying" that both the act itself[12]

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[9] Appendix to Petition for a Writ of Certiorari ("App.") at A-1.

[10] Cal. Gov't Code §§ 3512-24 (West 1980 & Supp. 1991).

[11] *Abood*, 431 U.S. at 236.

[12] Cal. Gov't Code § 3515.8 (West Supp. 1991) (emphasis added) explicitly provides that the "pro rata share [of the 'fair share fee'] subject to refund shall not reflect * * * the costs of supporting lobbying activities designed * * * to secure for the employees represented advantages in wages, hours, and other conditions of employment *in addition to those secured through meeting and conferring with the state employer*."

and the Court of Appeal[13] have recognized as plainly *outside of*—not "integral" to—the bargaining process. In this particular, then, the Dills Act is not a "collective-bargaining" statute at all, but rather a *forced-lobbying* statute *simpliciter*.[14]

B. The status of the union designated as the nonmembers' statutory exclusive representative[15] for the "limited" purpose of collective bargaining with respect to "wages, hours, and other terms and conditions of employment"[16] is merely the *identifying criterion*, but no *operational justification*, for the Dills Act's further implicit license to that union to expend "fair share fees" on lobbying.[17] For, in contradistinction to the cause-and-effect

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[13] *See* App. at A-36 to A-37.

[14] As far as dissenting nonunion employees are concerned, all compulsory public-sector collective-bargaining laws are forced-lobbying statutes with respect to the subject matters of collective bargaining, as the laws compel nonmembers to accept unwanted unions as their exclusive representatives for the purpose of petitioning their employers, agencies of government, as to terms and conditions of their employment. However, this Court has held that requiring nonunion employees to subsidize such forced lobbying is constitutional where it involves negotiations, contract administration, grievance adjustment, or other activities that are "an integral part of the bargaining process." *Abood*, 431 U.S. at 232, 236. The constitutional question remains open where, as here, the forced lobbying is *not* "an integral part of the bargaining process." In this brief, therefore, *amicus curiae* will import by the noun "lobbying" only that "lobbying" that is not also "an integral part of the bargaining process."

[15] Cal. Gov't Code § 3515.5 (West 1980).

[16] Cal. Gov't Code § 3516 (West Supp. 1991).

[17] The act nowhere explicitly authorizes a union to function as an exclusive, or even any compulsory, representative for lobbying. However, it excepts from an employee's "right to demand and receive * * * a return" of part of a "fair share fee" that amount which the union spends on "lobbying activities designed * * * to secure for the employees represented advantages in wages, hours, and other conditions of employment *in addition to those secured through meeting and conferring with the state employer*." Cal. Gov't Code § 3515.8 (West **[cont. over]**

relationship of interlocking legal duties between exclusive representation and "fair share fees" in the context of collective bargaining, in the context of the union's lobbying *simpliciter* ***no*** equivalent or even analogous relationship exists:

1. The union's indirect license as the nonmembers' supposed "representative" for purposes of lobbying is not as a matter of California law legally exclusive. The act provides that "the scope of [exclusive] representation shall *not* include consideration of the merits, necessity, or organization of *any service or activity provided by law* or executive order."[18] And, the union constitutionally may not be made the nonmembers' exclusive representative for lobbying.[19]

2. As a practical matter, too, the rationale for designating a single union as the representative of all employees in the context of collective bargaining, *i.e.*, avoiding what *Abood* described as "confusion," "rivalries," "dissension," and "conflicting

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Supp. 1991) (emphasis added). Thus, *sotto voce* the act ensconces the union in the position of a representative of dissenting employees for the purpose of lobbying.

[18] Cal. Gov't Code § 3516 (West Supp. 1991) (emphasis added). Moreover, Cal. Gov't Code § 3515.5 (West 1980), which provides that "the recognized employee organization is the only organization that may represent [an appropriate] unit in employment relations with the state," further mandates that "[n]othing in this section shall prohibit any employee from appearing in his own behalf in his employment relations with the state." Therefore, if union lobbying is arguably part of "employment relations with the state" (which *amicus curiae* questions), then the union's "representational" role in that activity must be reconciled with each employee's retained statutory right to "appea[r] in his own behalf" before the legislature. The Court of Appeal ridiculed the efficacy of this reserved statutory right of employee self-representation. *See* App. at A-40 to A-45. Whatever the merit of its views may be where the formal, structured process of collective bargaining with specific state-agency employers is concerned, they lack cogency in the open-ended context of lobbying the legislature.

[19] *See Madison Joint School Dist. v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167, 174-76 (1976), *as interpreted in Abood*, 431 U.S. at 230.

demands,"[20] collapses in the context of lobbying. For, in the legislative arena, political turbulence and turmoil are part and parcel of the plurality and diversity of views, robust debate, and political and ideological competition the First Amendment protects and, indeed, encourages.[21]

3. Moreover, although in collective bargaining both the state-agency employer and the union have legally enforceable duties to "meet and confer,"[22] in the realm of lobbying a union designated as an exclusive representative for purposes of collective bargaining enjoys *no* right to require the legislature to entertain its petitions[23] and suffers *no* duty to petition the legislature on "wages, hours, and other conditions of employment

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[20] "The designation of a single representative avoids the confusion that would result from attempting to enforce two or more agreements specifying different terms and conditions of employment. It prevents inte -union rivalries from creating dissension within the work force and eliminating the advantages to the employee of collectivization. It also frees the employer from the possibility of facing conflicting demands from different unions, and permits the employer and a single union to reach agreements and settlements that are not subject to attack from rival labor organizations." *Abood*, 431 U.S. at 220-21.

[21] *See, e.g., Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137-45 (1961).

[22] Cal. Gov't Code §§ 3517, 3518, 3519(c)-(d), 3519.5(c)-(d) (West 1980 & Supp. 1991).

[23] The Court of Appeal denigrated as a "quibble over semantics" the question of whether the California legislature is, in some sense, the nonmembers' "employer." App. at A-35 to A-37. Whatever the accuracy of the court's characterization of the legislature as the "employer" where lobbying may be concerned, the Dills Act clearly excludes the legislature from any duty to "meet and confer" with a union, by mandating solely that the "Governor, or his representative as may be properly designated by law, shall meet and confer • • • with representatives of recognized employee organizations." Cal. Gov't Code § 3517 (West 1980). And, of course, a union has no constitutional right to require the legislature to deal with it in the law-making process. *See Minnesota State Bd. v. Knight*, 465 U.S. 271, 283-85 (1984).

in addition to those secured through meeting and conferring with the state employer"[24] or on any other subject of concern to the employees it ostensibly represents in the bargaining process.[25]

Therefore, because the rationale for allowing "fair share fees" in the context of compulsory public-sector collective bargaining—namely, as financial compensation to the union for the tasks of negotiation, contract administration, and grievance adjustment that the law *requires* it to carry out fairly and impartially on behalf of all employees[26]—does not exist in the quite different context of forced lobbying, the petition presents a substantial constitutional issue which *Abood* did not directly answer. Absent this Court's intervention, some state courts and inferior federal courts will continue inaptly to apply *Abood* and related collective-bargaining cases to activities that have nothing functionally to do with collective bargaining, with predictably dire consequences for the First- and Fourteenth-Amendment rights of dissenting nonunion employees.

II. This Court should issue a writ of certiorari, because the California court's reasoning supports both forced lobbying and *forced political activism* for *all* interest groups in American society, not just public employees.

The decision of the Court of Appeal is particularly pernicious, and ultimately without limit, because the court's reasoning inexorably rationalizes *forced political activism*, as well as forced lobbying, both for public employees and for members of every other identifiable interest group in American society.

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[24] Cal. Gov't Code § 3515.8 (West Supp. 1991).

[25] The Dills Act defines "state employer" as "the Governor or his or her designated representative." Cal. Gov't Code § 3513(j) (West Supp. 1991). So, a union's duty as a collective-bargaining representative to "meet and confer" with the "state employer" has no limiting effect on its privilege to lobby, *or to refrain from lobbying*, the legislature.

[26] *See Abood*, 431 U.S. at 221-26.

A. According to the Court of Appeal, the Dills Act recognizes the legislature as the nonmembers' "employer" for the purposes of lobbying by the union.[27] The Court of Appeal presumed the union capable of representing nonmembers in lobbying with respect to "advantages in wages, hours, and other conditions of employment in addition to those secured through meeting and conferring with the state employer,"[28] because the union, as the nonmembers' exclusive agent for collective bargaining, also deals with wages, hours, and other conditions of employment that are "secured through meeting and conferring with the state employer."[29] And the Court of Appeal considered a "fair share fee" for such lobbying proper, because it believed that "a nonunion unit member benefitting from that [lobbying] representation should * * * be expected to contribute towards the cost of achieving it."[30]

Now, under the universally accepted theory of American constitutional government, even in California the legislature is merely the collective agent of the people. If the legislature is the public employees' mediate "employer" under the Dills Act for any purpose, then their ultimate "employer" must be the legislature's principal, the electorate.[31] Therefore, on the reasoning of the Court of Appeal that forced lobbying is warranted, because the legislature has designated itself as "employer" for that purpose, nothing precludes the legislature

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[27] App. at A-35 to A-38.

[28] Cal. Gov't Code § 3515.8 (West Supp. 1991).

[29] *See* App. at A-37.

[30] *Id.* at A-38. Lobbying "squarely implicates the essential state interest in eliminating the 'free rider' problem * * * ." *Id.*

[31] *See* Cal. Gov't Code § 3523(a) (West 1980), mandating that "[a]ll initial meet and confer proposals of recognized employee organizations shall be presented to the employer at a public meeting, and such proposals thereafter shall be a public record."

from also authorizing forced political activism—that is, the extraction from dissenting public employees of "fair share fees" for campaigning to convince the public to elect candidates to the legislature who support the union's view of what are appropriate "advantages in wages, hours, and other conditions of employment in addition to those secured through meeting and conferring with the state employer."

Surely, if the legislature can be characterized as the nonmembers' "employer" for purposes of union lobbying, the public can be characterized as their "employer" for purposes of union electioneering. And, if the former characterization will support the extraction of "fair share fees" for lobbying, the latter will equally rationalize similar exactions for partisan-political campaigning. For, in both cases, absent the collection of fees, "nonunion unit members" will assumedly benefit from the union's "representation"—in terms of the enactment of favorable legislation or the election of pliant legislators—without "contribut[ing] toward the cost of achieving it."[32]

In short, if the Court of Appeal's opinion is correct as to the constitutionality of forced lobbying, it must also in principle rationalize forced political activism. And that would be a radical departure, not only from the basic tenets of First-Amendment jurisprudence, but also from any sensible reading of *Abood*.[33]

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[32] *Amicus curiae* merely *assumes* "benefit" for the sake of argument. Nonmembers may, and as evidenced by their very nonunion status do, have numerous economic and political reasons for disputing the value to them of union lobbying and electioneering.

[33] *Abood* held that nonunion public employees may *not* be required to subsidize union activities "on behalf of political candidates, or towards the advancement of other ideological causes not germane to [the union's] duties as collective-bargaining representative." 431 U.S. at 235. The direct linguistic linkage between "political candidates" and "*other* ideological causes not germane to [the union's] duties" demonstrates that *Abood* considered support of "political candidates" "not germane" to collective bargaining *as a matter of law*.

B. Furthermore, the Court of Appeal's twisted logic has potentially universal application. For, under that reasoning, *any* organization that purports in some manner to "represent" an identifiable group, the members of which the legislature assumes share a community of interests, could be designated the lobbying, or even the partisan-political, "representative" of everyone in that group and allowed to charge a "fair share fee" for this coercive "service," without constitutional hindrance. And any organization lusting for this Orwellian license would need to satisfy but two hardly onerous criteria: (i) that its lobbying or political activism would advance what it perceives as the common interests of the group it claims to "represent"; and (ii) that, absent a power to exact a "fair share fee" from dissidents, the latter would constitute "free riders" on the benefits supposedly flowing from the "representation" the organization imposes on them.

To label this fear unfounded would be naive, if the sordid history of attempts to co-opt and prostitute public power by private special-interest groups under the statutory mechanism of exclusive representation is at all instructive.[34] And not to check the danger in this case, when it is yet isolated and easily thwarted, would allow—indeed, encourage and enable—that danger to grow to proportions that might overwhelm any later judicial resistance to the radical politicization of American society into the "goose-stepping brigades" of ideological conformists "at least partially regimented behind causes which they oppose," against the creation of which Mr. Justice Douglas foresightedly premonished this Court in *Lathrop v. Donohue*.[35]

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[34] *See* National Industrial Recovery Act, Act of June 16, 1933, ch. 90, 48 Stat. 195, *declared unconstitutional in A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

[35] 367 U.S. 820, 884 (1961)(dissenting). The Court of Appeal's pernicious doctrine has already been extended to contexts other than public employment. In *Shaw v. Flight Attendants*, 118 Lab. Cas. (CCH) ¶ 10,543, at 27,353 (W.D. Mo. Aug. 21, 1990), the court applied public-sector agency-shop cases to hold that section 2, Eleventh of the Railway Labor Act, 45 U.S.C. § 152, Eleventh (1982), constitutionally authorizes unions to charge nonmembers for [cont. over]

III. This Court should issue a writ of certiorari to correct the basic misinterpretation of *Abood* that pervades the opinion of the Court of Appeal and has misled other courts.

A. The Court of Appeal's perverse misreading of *Abood* is not unique. Other lower courts have misinterpreted that decision, too (although not in ways as broadly erroneous as the Court of Appeal's blanket licensing of forced lobbying). Two of those lesser misreadings this Court has, unfortunately, passed over in silence.[36] One related misinterpretation it has addressed and corrected.[37]

Yet another misapplication of *Abood* hopefully will be corrected shortly in *Lehnert*,[38] which presents, *inter alia*, a question parallel to that here. Therefore, the Court should hold this petition until it decides *Lehnert*. If the Court rules in *Lehnert* that the Constitution prohibits all forced lobbying other than that which is "an integral part of the bargaining process"[39] between an exclusive representative and dissenting nonmembers' employer, then it should grant the petition in this case and, at the

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lobbying activities insofar as they "address legislation and regulations affecting the terms and conditions of employment of members of the bargaining unit." *Shaw* disingenuously ignored the fact that those public-sector cases relied on purported differences between private- and public-sector employment to *distinguish* the holding of *Street* that, as this Court put it in *Ellis*, 466 U.S. at 447 (emphasis added), objectors "could not be burdened with *any part* of the union's expenditures in support of political or ideological causes." *See Lehnert*, 881 F.2d at 1391-92; *Robinson v. New Jersey*, 741 F.2d 598, 604-10 (3d Cir. 1984), *cert. denied*, 469 U.S. 1228 (1985).

[36] *Robinson*, cited *supra* note 35; *Champion v. California*, 738 F.2d 1082 (9th Cir. 1984), *cert. denied*, 469 U.S. 1229 (1985).

[37] *See Keller v. State Bar*, 110 S. Ct. 2228 (1990).

[38] 59 U.S.L.W. 3361 (U.S., argued Nov. 5, 1990) (No. 89-1217).

[39] *Abood*, 431 U.S. at 236.

least, summarily reverse on the authority of *Lehnert*.[40] The Court should not merely vacate and remand for reconsideration in light of *Lehnert*, because the Court of Appeal has already twice shown an unwillingness to follow this Court's teachings, and because the gross errors in the Court of Appeal's opinion, exploded *infra*, cry out for explicit disapprobation.[41]

B. The Court of Appeal assumed that, under *Abood*, the controlling issue in deciding the constitutionality of forced lobbying—or, for that matter, the constitutionally permissible extent of any allegedly "representational" activity of a public-sector union—is the identity of the "employer." If the union "interact[s]" with the "employer" in a "representational" capacity, the Court of Appeal simplistically reasoned, the union may charge dissenting employees a "fair share fee" for its alleged "services."[42] That is wrong.

The controlling question under *Abood* is not whether the union "interact[s]" with the "employer" in a supposedly "representational" (or any other) capacity, but whether its "interact[ion]" with the "employer," or even with some entity other than the immediate "employer," is "an integral part of the

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[40] That disposition would be consistent with the practice of the Court where the law is settled by a prior decision. *See, e.g.*, 388 U.S. 440-54 (1967), where the Court summarily reversed ten lower court judgments citing *Redrup v. New York*, 386 U.S. 767 (1967).

[41] The importance of this task is manifest. For, as the Court said in *Abood*, "'If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics • • • or other matters of opinion or force citizens to confess by word or act their faith therein.' These principles • • • are no less applicable to the case at bar" involving compulsory public-sector collective bargaining. 431 U.S. at 235 (citation omitted) (*quoting West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)).

[42] App. at A-35 to A-37.

bargaining process" *vel non*.[43] If it is not, the identity of the "employer" and the purportedly "representational" character of the union's activity are beside the point.

Thus, in this case, whether or not the legislature is petitioners' "employer," "fair share fees" to defray the costs of certain limited types of lobbying by the union, explicitly defined in the Dills Act,[44] may be constitutionally permissible, because *that* lobbying *is* "an integral part of the bargaining process," in as much as it is necessary for a collective-bargaining agreement to become effective as a matter of law. However, and again whether or not the legislature is petitioners' "employer," other types of lobbying that the Dills Act explicitly recognizes as "designed * * * to secure for the employees represented advantages in wages, hours, and other conditions of employment *in addition to those secured through meeting and conferring with the state employer*"[45] are clearly not "an integral"—or even any—"part of the bargaining process," and therefore cannot constitutionally support the imposition of "fair share fees."

C. On the basis of its "summary of high court cases," the Court of Appeal concluded that

> the test for dividing * * * between chargeable and nonchargeable expenses can be boiled down to this: when the union is acting qua union, expenses can be exacted; when it is merely an organization taking actions having no connection with the representation of the bargaining unit on employment-related matter, expenses may *not* be exacted.[46]

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[43] *Abood*, 431 U.S. at 236.

[44] Cal. Gov't Code §§ 3517.5, 3517.6 (West 1980 & Supp. 1991).

[45] Cal. Gov't Code § 3515.8 (West Supp. 1991) (emphasis added).

[46] App. at A-37.

That is not only wrong, but even nonsensical.

1. What it means for a "union [to be] acting qua union," the Court of Appeal did not explain. If the court meant by this cryptic comment what typical unions typically do to advance the interests of their voluntary members, its "test" wildly exaggerates the ambit of the authority to charge "fair share fees" to dissenting nonmembers. For unions generally engage in numerous activities, other than collective bargaining, that their voluntary members desire—which the Dills Act explicitly recognizes.[47] But if "expenses can be exacted" from nonmembers whenever the union is performing "union-like" functions, then the "fair share fee" reduces simply to a disguised subsidy of the union as an institution, with no necessary relationship to the union's actual costs of negotiations, contract administration, and grievance adjustment.

2. The court's further question-begging elaboration—that "the union is acting qua union" when it is "an organization taking actions having * * * [a] connection with the representation of the bargaining unit on employment-related matter"—is no better explanation or excuse for the exaction of a "fair share fee" from nonunion employees in that unit. For the standard under *Abood* is, not whether the union's actions have *some undefined* "connection with the representation of the bargaining unit on employment-related matter," but instead whether those actions come within the operational categories of negotiations, contract administration, and grievance adjustment, or are otherwise "an integral part of the bargaining *process*."[48]

At the logical margin, *anything* that a union which is the exclusive representative of a group of employees does to further,

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[47] Cal. Gov't Code § 3513(a) (West Supp. 1991) (emphasis added) requires only that an "employee organization" have "as *one* of its primary purposes representing * * * employees in their relations with the state."

[48] *Abood*, 431 U.S. at 232, 236 (emphasis added).

in its view, their economic *or political* welfare as employees is "connect[ed] with the representation of the bargaining unit on employment-related matter," simply because *the union* (the representative) is doing it "for" the employees (thereby rendering its action "employment-related," by definition)! Thus, under the Court of Appeal's *ersatz* "test," the union's narrow *statutory* grant of a "scope of representation * * * *limited* to wages, hours, and other terms and conditions of employment"[49]—the *only* type of statutory grant of "representational" authority that this Court has ever countenanced—expands into an unlimited (and thus *un*constitutional) license to charge essentially all of its expenses to nonmember employees through the "fair share fee" (just as it charges all of its expenses to its voluntary members through its regular membership dues).[50]

In short, the Court of Appeal's "test" perverts the "fair share fee" allowed in *Abood* from a narrowly circumscribed financial *quid pro quo* for demonstrable "collective-bargaining" services the union provides to nonmembers into a broad institutional subsidy of the union as an organization. If that reading of *Abood* were correct, which it is not, then as a practical matter *Abood* would be merely a judicial "tale told by an idiot, full of sound and fury, signifying nothing."

D. Finally, the Court of Appeal feigned inability to

> fathom how a union's lobbying the Legislature for improvement of the conditions of employment of the members of its bargaining unit—union and nonunion alike—could not be considered to be part of its role as representative, nor why a nonunion unit member benefitting from that representation should not be

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[49] Cal. Gov't Code § 3516 (West Supp. 1991) (emphasis added).

[50] *See Lehnert v. Ferris Faculty Ass'n*, 707 F. Supp. 1473, 1482 (W.D. Mich. 1988).

> expected to contribute towards the cost of achieving it.[51]

The simple corrective for that ignorance is to recognize that *Abood* did not sanction "fair share fees" to subsidize union lobbying of the legislature for *any* purpose.[52]

Abood countenanced collection of "fair share fees" from nonunion *public*-sector employees on the basis of this Court's precedents that dealt solely with *private*-sector collective bargaining.[53] Because the *Abood* Court believed that the "differences between public- and private-sector collective bargaining simply do not translate into differences in First Amendment rights" for employees, it held that the private-sector decisions were "controlling" in the public sector, too.[54] *But, in the private sector, lobbying and collective bargaining are, in the legal sense, utterly distinct.*[55] So, *Abood*—based as it was on an application of what the Court itself treated as conceptually "controlling" decisions from the private sector—could not possibly have sanctioned lobbying as part of a public-sector union's "role as representative" that could constitutionally be charged to nonunion employees in "fair share fees."

The Court of Appeal's opinion on this point, then, is a mere *ipse dixit*. The Court of Appeal may illogically believe that union lobbying on subjects that even the Dills Act candidly acknowledges are "*in addition to* those secured through meeting

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[51] App. at A-37 to A-38 (footnote omitted).

[52] Of course, where "lobbying" is "an integral part of the bargaining process" that "lobbying" *is* "collective bargaining," by definition. *See supra* note 14.

[53] *See* 431 U.S. at 217-32.

[54] *Id.* at 232.

[55] *See Street*, 367 U.S. at 768-70 & n.17.

and conferring with the state employer"[36] is part of the union's "role as [*collective-bargaining*] representative"—but *Abood* provides no rational support for that view. Quite the opposite.

Notwithstanding its nonsensicality, the Court of Appeal's *ipse dixit* is a dangerous precedent, however, because it divorces the activities for which a union may exact "fair share fees" (here, lobbying) from the purpose for which that union has been designated the nonunion employees' exclusive representative (in all cases, collective bargaining). Under *Abood*, "fair share fees" are chargeable *only* where the activities and the purpose operationally coalesce; whereas, under the Court of Appeal's decision, "fair share fees" are chargeable for whatever activities the "representative" undertakes ostensibly "on behalf of" employees, regardless of the functional connection, or lack thereof, of those activities to the *process* of collective bargaining. Under *Abood*, the specific character of the activities, not the mere status of the union as the "representative," controls the constitutional result; whereas, under the Court of Appeal's decision, the mere status of the union validates as chargeable any activities that the union deems tend towards "improvement of the conditions of employment." In short, the Court of Appeal's decision grants the union unlimited license to use dissenters' fees.

CONCLUSION

The California Court of Appeal has decided an important question of federal constitutional law which has not been, but should be, settled by this Court, and has decided it in a way that conflicts with principles of First-Amendment jurisprudence as previously applied by this Court in its agency-shop decisions. However, because that question will undoubtedly be settled in *Lehnert*, this petition should be held until the Court issues its decision in *Lehnert*. Then, for the reasons stated above, the

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[36] Cal. Gov't Code § 3515.8 (West Supp. 1991) (emphasis added).

Court should summarily reverse the decision of the court below on the authority of *Lehnert*.

Respectfully submitted,

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March 22, 1991